SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 91

IVAN C. McLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, PETITIONER,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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A (Filed endorsement omitted)

1 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMPRESA HONDURENA DE VAPORES, S. A., *Plaintiff*,

against

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Defendant*.

Complaint—Filed December 12, 1961

Plaintiff by its attorneys, White & Case, alleges upon information and belief:

1. The jurisdiction of this court is invoked under sections 1331 and 1337 of Title 28 of the United States Code.

The matter in controversy arises under the Constitution, the laws and a treaty of the United States hereinafter referred to and the matter in controversy exceeds the value of $10,000.00, exclusive of interest and costs.

2. Plaintiff is a corporation duly organized in 1941 under the laws of the Republic of Honduras, with its principal office and place of business at Puerto Cortes, Honduras. Its principal business is owning and/or operating 13 seagoing vessels which are registered under the laws of Honduras, fly the Honduran flag, are manned by unlicensed seamen employed in Honduras by plaintiff under Shipping Articles executed in Honduras. All but one of said seamen are citizens of Honduras and he is a subject of Great Britain.

3. Defendant is the Regional Director for the Second Region of the National Labor Relations Board created by Congress under Article 1 section 8 of the Constitution of the United States.

Said Second Region includes the County of New York, within the Southern District of New York.

Said defendant is charged with the responsibility of carrying out the orders of the National Labor Relations Board, pursuant to the Labor Management Relations Act, Chapter 7 of Title 29 of the United States Code.

4. On November 15, 1961 the National Labor Relations Board (the "Board") rendered its Decision and Direction

of Election in Case No. 2-RC-10739, United Fruit Company and National Maritime Union of America, AFL-CIO, in which proceeding the National Maritime Union of America, AFL-CIO, petitioned for an election among the unlicensed seamen employed on vessels owned and/or operated by plaintiff and time chartered to United Fruit Company. Plaintiff intervened as a party on the ground that it was the sole employer of said seamen. Said Decision and Direction of Election directed an election by secret ballot to be conducted by defendant among said employees. A copy of this Decision and Direction of Election as corrected and amended by the Board is attached as Exhibit 1.

5. On or about November 22, 1961, plaintiff's attorneys received a communication dated November 21, 1961 from the office of defendant, copy of which is attached as exhibit 2, informing plaintiff that a pre-election conference was to be held at the office of the Board, Second Region, 745 Fifth Avenue, New York, N. Y., on December 1, 1961 relating to the conduct of the election.

Such pre-election conference held on December 1, 1961 was adjourned until December 11, 1961. On December 11, 1961 plaintiff was informed that defendant would issue a notice on December 12, 1961 of the dates and times and the manner of the conduct of the elections to be held pursuant to the order of the Board among said employees of plaintiff. Defendant informed plaintiff that the election is scheduled to take place on December 17, 1961 on board vessels owned and/or operated by plaintiff upon their arrival in ports of the United States between December 17, 1961 and January 31, 1962 and by mailing ballots to said employees not aboard vessels scheduled to call at said United States ports between said dates.

6. Plaintiff is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. None of its officers or directors is employed by or associated with United Fruit Company and since its formation in 1941 all of its officers and directors have resided in Honduras.

7. Plaintiff owns ten of the seagoing vessels which it operates. It acts as agent for Balboa Shipping Company Inc., a Panamanian subsidiary of United Fruit Company, in the management and operation of three additional vessels

which are owned by Balboa Shipping Company Inc. These thirteen vessels (the "Vessels") are presently time chartered to United Fruit Company and call at various ports in Central and South America, the United States, Canada and Europe. All of them call regularly at Honduran ports for trade and renewal of Ship's Articles.

8. The Vessels are registered under the Honduran flag. Plaintiff has never owned or operated American flag ships.

9. The Republic of Honduras has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon. Plaintiff is required to and does comply with these laws and regulations.

a. Each such vessel is required to carry on board a "Patente Definitiva de Navegacion" ("Patente") issued by the Republic of Honduras under signature of the Port Commandante of its home port (Puerto Cortes or Tela) evidencing ownership of said vessel. Such ownership is also inscribed in the Registry of Sea-going Vessels maintained by the Port Commandante.

Prior to the issuance of each Patente the owner must file in accordance with the requirements of the laws of the Republic of Honduras an application with the Republic of Honduras at Tegucigalpa enclosing with the application the bill of sale proving ownership of the vessel and must comply with certain other requirements under Title 2, Ley Organica de la Marina Mercante Nacional (1943).

b. Each such vessel is required to carry on board a safety equipment certificate issued by the Republic of Honduras, a navigation license, navigation log, crew roll, cash book, cargo book, compass log, tonnage certificate, load line certificate, charter party and a copy of the Commercial Code of Honduras and, if it carries radio equipment, the ship's station must be licensed by the Republic of Honduras and employ call letters and frequencies assigned by the Republic.

c. The officer personnel employed aboard such vessels must be licensed by the Honduran Government.

d. All unlicensed seamen in order to secure employment on such vessels of Honduran Registry are required to furnish a birth certificate, a Honduran passport, a Honduran seaman's identification book, the issuance of which is governed by Articles 56-64 of the Honduran Merchant Marine Act, a certificate of military inscription and a vaccination certificate. All unlicensed seamen are required to undergo physical examination by a physician and must secure a medical certificate signed by this physician and a Honduran health official.

e. Each such seaman is required before he leaves Honduras to sign the Ship's Articles maintained in accordance with Article 24 of the Honduran Merchant Marine Act which lists the name of each seaman, his age, marital status, place of birth, nationality, domicile and name and address of next of kin. The Ship's Articles are certified by the Port Commandante in Honduras.

10. Plaintiff employs approximately 335 unlicensed seaman upon the Vessels. All but one of these unlicensed seamen are citizens of the Republic of Honduras. The one non-Honduran citizen is a Jamaican and a subject of Great Britain. With four possible exceptions, all of the unlicensed seamen are residents of the Republic of Honduras.

11. United Fruit Company has no employer relationship whatever with any employee of plaintiff including seamen employees. Plaintiff has the sole and exclusive authority and control over all matters concerning terms and conditions of employment including hiring, firing, wages and discipline of employees.

12. Since 1941 the unlicensed seamen employed by plaintiff have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, as their collective bargaining agent. Collective bargaining agreements have been entered into between plaintiff and this collective bargaining agent since 1942. The agreement now in effect is dated March 29, 1957. With certain adjustments as to wages and related matters, this contract has been in effect at all times since said date and has been renewed by its terms until February 15, 1963. A copy and translation are attached as Exhibit 3.

All of said unlicensed seamen are members of Sociedad (the Union) in accordance with paragraph 3 of said agreement.

13. Under Honduran law plaintiff is required to recognize the Union as the exclusive bargaining agent of its unlicensed seamen.

Labor grievances concerning the unlicensed seamen employed by plaintiff are handled by representatives of plaintiff and the Union, including referral of such grievances to the Public Solicitor of the Ministry of Labor, the Labor Courts and to the Minister of Labor of Honduras.

14. Furthermore, under the laws of Honduras, the petitioner in Case No. 2-RC-10739, National Maritime
4 Union of America, AFL-CIO, (NMU) cannot gain recognition by the Honduran Government and could not lawfully represent plaintiff's said employees. Articles 490 and 504 of the Honduran Labor Code provide in translation as follows;

> "Article 490: No union may be permitted to act as such nor to exercise the functions prescribed to it by law or by its respective by-laws, nor to exercise its rights so long as it does not have recognition of its juridic personality, and may act as such only during the time it is so recognized."
>
> Atricle 504: "No union may function whose personnel is not composed of at least ninety per cent (90%) of Honduran citizens. No matter what is the form of direction of the union, no alien is eligible for directive posts."

NMU does not have Honduran recognition of its juridic personality nor are at least 90% of its personnel Honduran citizens.

15. Finally, plaintiff has received from the Government of Honduras an official ruling of its Ministry of Labor to the effect that the action of the Board in this case, in assuming jurisdiction over the plaintiff and its unlicensed seamen and in directing the election, is a violation of the sovereignty of the Republic of Honduras and null and void under its law. A translation of the said ruling is attached as Exhibit 4.

16. The Board had no jurisdiction to direct defendant to conduct an election among said employees of plaintiff and in so directing acted in excess of its powers. The Supreme Court of the United States held in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), that the Labor Management Relations Act of 1947 (Chapter 7, Title 29 of the United States Code) does not apply to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers.

17. In its Decision and Direction of Election the Board acted in violation of the Constitution of the United States.

a. Such action violates Article VI of the Constitution in contravening the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, 45 Stat. 2618 (1927). Article 10 of this treaty provides:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

b. Such action is in disregard of the principles of international law recognized and adhered to by the Department of State and violates Article II, section 2 of the Constitution by infringing upon the functions and powers granted to the Executive Department of the United States Government to conduct the foreign affairs of the United States.

c. Such action violates Article I, section 8 of the Constitution by exceeding powers granted to Congress thereunder, and

d. Such action violates Amendment V to the Constiution by depriving plaintiff of its "liberty, or property, without due process of law", in that it deprives plaintiff, a citizen of the Republic of Honduras, of its liberty to contract and, furthermore, impairs its rights under the existing collective bargaining agreement with the Union.

18. Plaintiff will suffer immediate and irreparable damage unless defendant, his agents, servants, employees, attorneys and all persons acting for and in concert with him are enjoind from conducting an election among the seamen employees of plaintiff in the following respects, among others:

a. Plaintiff will be denied the protection and rights granted to it under the laws and Constitution of the United States;

b. Plaintiff will be caused to violate its existing collective bargaining agreement with the Union and may be subjected to damages and other sanctions as a consequence thereof;

c. Plaintiff will be caused to violate the Honduran law requiring it to recognize the Union as the exclusive bargaining agent of plaintiff's seamen employees and may thereby be subjected to penalties and other sanctions under Honduran law; and

d. The operation of the Vessels will be impaired and plaintiff's relations with its seamen employees seriously disturbed and disrupted, all to plaintiff's loss and economic disadvantage.

19. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays judgment permanently enjoining the defendant, his agents, servants, employees, attorneys and all persons acting in concert with him from carrying out the Board's aforesaid Decision and Direction of Election dated November 15, 1961 and from conducting an election among plaintiff's said employees and granting such other and further relief as may be just and proper.

And plaintiff prays that an order be made temporarily enjoining during the pendency of this action the carrying out of the aforesaid Decision and Direction of Election and the holding of an election thereunder.

Dated December 12, 1961

WHITE & CASE
By /s/ ORISON S. MARDEN
A Member of the Firm.
Attorneys for Plaintiff,
14 Wall Street,
New York 5, N. Y.

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ORISON S. MARDEN, being duly sworn, says that he is one of the attorneys for the plaintiff in this action; that the foregoing complaint is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

This verification is made by deponent and not by an officer or director of the plaintiff because all of the plaintiff's officers and directors reside in the Republic of Honduras and none is presently within the United States. The sources of deponent's information and the grounds for his belief are the sworn record and exhibits in case No. 2-RC-10739 (United Fruit Company and National Maritime Union of America, A. F. L.-C. I. O.) before the National Labor Relations Board, which proceeding resulted in the Decision and Direction of Election dated November 15, 1961 under which defendant proposes to take the action herein sought to be enjoined and from information supplied to deponent by agents of plaintiff.

/s/ ORISON S. MARDEN

Sworn to before me
December 12, 1961

ROBERT A. PERKINS
Robert A. Perkins
Notary Public-State of New York
No. 41-832750-Queens County
Certificate filed in New York County
Term Expires March 30, 1962

7 **Exhibit 1 to Complaint**

184 NLRB No. 25 D-2594
New York, N. Y.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY
and
NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Decision and Direction of Election

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Jacob Lazarus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record of this case,[1] the Board finds:

1. The Petitioner seeks a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag

[1] On May 31, 1960, the Board held a consolidated hearing for purposes of oral argument in *West India Fruit and Steamship Company, Inc.*, 130 NLRB No. 46, *Peninsular & Occidental Steamship Company*, 132 NLRB No. 2, and *Eastern Shipping Corporation*, 132 NLRB No. 72, on certain issues concerning the jurisdiction of the Act over ships flying the flags of nations other than the United States and concerning policy considerations involved in the Board's assertion of jurisdiction over such vessels. Similar issues are raised in this proceeding. Thus, as it appeared that United Fruit Company, the Petitioner, and Sociedad Nacional De Marinos Honduras, a Honduran organization, might have a substantial interest in the outcome of the *West India* and other cases referred to above, they were invited to participate as *amicus curiae* in the oral argument. Only the Petitioner accepted the invitation and appeared by counsel at the hearing. See *West India Fruit and Steamship Company*, *supra*, pp. 1-2, footnote 5.

As set forth in our decision in the *West India case*, supra, p. 2, fn. 4, the Attorney General of the United States was permitted to intervene in this and the other three cases referred to above and in his brief, filed on November 18, 1960, presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to the four cases.

vessels which it alleges are beneficially owned and controlled by the United Fruit Company, here called UFCO, through its wholly owned foreign subsidiaries, Empresa Hondurena de Vapores, S.A.[2] and Balboa Shipping Corporation. UFCO contends that it is not, as alleged, the employer of the seamen involved and neither owns nor, as a time-charterer, operates the ships covered by the petition. Both UFCO and Empresa argue basically that as Empresa is a foreign corporation, is the employer of the seamen, and is engaged in its own business of operating and chartering the vessels, and as the vessels are of Honduran registry and the seamen or foreign nationality, the maritime operations involved are not within the jurisdiction of the Labor Act. Thus, the issue raised here concerns not only the effect upon the Act's jurisdiction of the foreign aspects adhering to Empresa's maritime operations, but also a determination of the relationship of Empresa and its operations to UFCO and its shipping trade.

As for the companies' arguments based upon the flag law and other international law doctrine and upon certain treaties and conventions between the United States and Honduras, such matters were dealt with at length in the Board's decision in *West India*. It was there concluded that the presence of such matters does not necessarily preclude the Act's coverage of a given maritime operation.[3] Similarly in the *Peninsular and Occidental*[4] and in the *Eastern Shipping*[5] cases it was held that the foreign incorporation of the legal owner and operator of a vessel and apparent employer of its crew did not alone take the vessel beyond the reach of the Act's jurisdiction.

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[2] Empresa Hondurena de Vapores, a Honduran Corporation, moved to intervene on the ground that it was the employer of the employees covered by the petition. Empresa was, without opposition, permitted to intervene at the hearing and has participated fully at all stages of this proceeding.

[3] The treaty and consular conventions with Honduras are substantially the same as those with Liberia considered in the *West India* decision at pp. 19-21.

[4] 132 NLRB No. 1, at 5.

[5] 132 NLRB No. 72, at 5-6.

However, none of these cases supports the proposition, in effect urged upon us here by the Petitioner, that underlying stock or other beneficial ownership and, thus, ultimate control of a foreign corporation and its operations by domestic United States interests necessarily bring the foreign corporation or its operations within the coverage of the Act. We do not read the Act as necessarily following United States investments abroad. It is the commerce of this nation, not of foreign nations, with which the Act is concerned. Also we are aware that international seaborne commerce will by its very nature involve insofar as this notion is concerned trade or transportation between foreign nations and a State. Nothing in the Act or relevant cases suggests, however, that all seaborne commerce reaching our ports on regular runs or sporadically is within the Act's coverage irrespective of other aspects of the operations.[6] In following the Supreme Court's *Lauritzen* decision,[7] the Board has pointed out that the test of jurisdiction given commerce literally within Section 2(6) is whether there exist substantial contacts between the "foreign" maritime operation and important United States interests.[8] Rather the problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States.[9] Such a view clearly lends itself to the result that a foreign maritime operation can retain its essentially foreign nature and remain the commerce of a foreign nation outside the coverage of the

[6] See, *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U.S. 138 (1957); also, *Lauritzen* v. *Larsen*, 345 U.S. 571, 581 (1952).

[7] *Lauritzen* v. *Larsen, supra.*

[8] E.g., *West India, supra*, p. 15; *Eastern Shipping Corporation, supra*, at 2.

[9] *West India, supra*, 15; *Eastern Shipping Corporation, supra*, p. 6.

[10] Thus, in both the *Eastern Shipping* case at p. 5 and in *Hamilton Bros.*, 133 NLRB No. 85, p. 3, the Board noted in finding the Act applied that the U. S. contacts present were not just the result of the foreign-seaborne trade of a truly foreign venture.

Act despite underlying United States interests and certain commercial contacts with this country. At the same time, this view looks beyond the formal foreign aspects to determine if the maritime operation is in fact one primarily based in and operating out of the United States or essentially a adjunct of a domestic corporation's operations in the international trade of the United States, and, thus, is the shipping of this nation and, consequently, covered by the Act. It follows, as we emphasized in our *West India* decision (at pages 21 and 31) and as we reemphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere or across the seas, the controlling criteria are the same.

8a

It is in the light of these considerations that we must approach the facts and issues before us in deciding the jurisdictional question. UFCO is a New Jersey corporation with its principal place of business at Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by citizens of the United States. Its business interests extend world-wide and involve a rather diverse group of activities. However, it is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. The bulk of its trade is between Central and South American locations and United States ports, and the value of its imports into this country exceed one million dollars annually, and are carried in large part on ships either owned or chartered by UFCO, including those subject of the present petition.

Though it is an operating company, UFCO also to a large extent carries out its operations through some fifty to sixty subsidiaries, many of which are foreign corporations such as Empresa, the subsidiary involved in this proceeding. The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the day-to-day problems of their operations while over-all policy and development control resides in the parent com-

pany. The extent and nature of that control is the subject of sharp disagreement between the Petitioner and the companies. But the record shows that, though day-to-day operations are in fact handled by the subsidiaries themselves, long-range plans concerning expansion, contraction or other changes in the operation of subsidiaries are generally controlled by UFCO and its decision with respect to such matters is based not so much upon the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce.

Empresa is, as noted, one of UFCO's wholly-owned subsidiaries. It was organized under the laws of Honduras in 1941 by UFCO which supplied the capital for the venture. Empresa's officers are elected by its directors who are in turn elected by the sole stockholder, UFCO. There are, however, no interlocking directors with, or officers common to, Empresa and its parent. Furthermore, Empresa maintains all its own records, holds real estate in its own name, and otherwise appears to function as a distinct corporate entity. It is engaged in the business of owning and operating vessels registered under the laws of Honduras. However, it does not carry passengers or cargo on its own account. Rather, since its incorporation it has time chartered all its vessels and its income from its maritime operations, which exceed $400,000 annually, is derived wholly from the charter fees. But Empresa does not, as the record shows, hold itself out to the shipping world generally as being engaged in the business of chartering vessels. On the contrary, since its
9 formation its business has been limited with but a few possible exceptions[11] to chartering its vessels to UFCO, and the seventeen ships under its control at the

[11] It was stated in the record by several Company witnesses that Empresa chartered its vessels to UFCO and no other company. However, an exhibit shows that certain of the vessels had, on relatively rare occasions, been under charter to companies unrelated to UFCO; but, whether Empresa itself had so chartered the vessels or whether they were in fact rechartered by UFCO to the stranger companies does not appear. In either event, it remains clear that Empresa does not look to the general shipping market but rather to UFCO for the chartering of its vessels.

time of the hearing and which are the subject of the petition[12] were so chartered.

As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships[13] and for provisioning them,[14] except for fuel, but also for hiring the officers and crews[15] and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel.[16] There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter.

UFCO, as the time charterer of the vessels, determines what voyages they shall make, their ports of call, their length of stay in various ports, and what cargoes they shall carry. In exercising its control, UFCO deals directly with the captain of the vessel involved. If it is dissatisfied with

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[12] Empresa owned 14 of these vessels. Three were owned by Balboa Shipping Corporation, a Panamanian Corporation wholly owned by UFCO. Empresa is the managing agent of such vessels which, like its own ships, fly the Honduran flag. Balboa is not at this time directly involved with the operation of its three vessels which are, for all practical purposes, as fully under Empresa's control as are its own vessels. As Empresa's control over the vessels of Balboa appears to be the same as that over its own vessels, it is unnecessary for the purposes of this decision to distinguish between the two groups of vessels. We note, moreover, that it is not contended that jurisdiction over Balboa's vessels turns on factors other than those also applicable to Empresa and its vessels.

[13] Empresa is responsible not only for day-to-day upkeep of the vessels but also for having the ships drydocked and repaired. Both are usually done in the United States. However, betterments for vessels or the purchase and scrapping of vessels are matters usually falling within the over-all policy control of UFCO.

[14] Supplies are purchased both in foreign nations and the United States. Most of what it buys in this country is purchased from Maratrop Trading Corporation, a wholly owned UFCO subsidiary.

[15] The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles.

[16] Empresa, as part of its control over personnel, has bargained with a Honduran organization as the representative of the crews of its vessels. See below, fn. 22.

the handling of a vessel by its officers or crew or with its mechanical or other condition, it directs its complaints directly to Empresa, which is responsible for making any necessary changes. The ships are used, for the most part, to carry produce of UFCO's Latin American operations,[17] and on any given trip may call at ports in various Central and South American countries including those of Honduras. As the bulk of the trade is between such countries and the United States, the vessels regularly call at the ports of this nation. On their return trips to Latin America the ships carry cargo for various UFCO subsidiaries and also general cargo for shippers and consignees outside the UFCO organization.

The record further shows that the Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO bareboat charters from one of its U. S. subsidiaires or owns outright a number of cargo ships registered under the laws of the United States. These ships, like Empresa's, are under the jurisdiction of UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargos and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

The facts, outlined above, show that the maritime operations before us come literally within the Act's definition of commerce as they encompass in large part, transportation and trade between foreign countries and States of this nation. They further demonstrate that the relationship between UFCO and Empresa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market. Supporting this conclusion are, *inter alia*, (1) that Empresa's capital expenditures and other substantial changes in operations are tied to UFCO's sea-going transportation needs, both present and projected, (2) that Empresa, with but few possible exceptions, time-charters its vessels to UFCO only and does not look to the open market for

[17] Some, if not all, of the ships also carry passengers.

business, and (3) that Empresa's vessels are utilized by UFCO as an integral and necessary part of its fleet of vessels and not chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise.[18] Thus, the record shows that Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act. It is also evident, and we find, that Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition.[19]

We find, further, under the circumstances here that the maritime operations before us possess those substantial United States contacts which, under our decision in West India,[20] bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels,

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[18] In the situation where it or its subsidiaries' vessels cannot meet its needs, UFCO charters vessels from outside its family of companies. Also, it might be noted here that, in its annual reports, UFCO refers to the vessels involved in this proceeding as its own vessels and notes that certain vessels for foreign flag operations were built to its specifications, and so forth. There is nothing in such reports to indicate that UFCO considers the foreign flag vessels to be other than its own or to be otherwise than completely under its control.

[19] In so finding, we are not holding that a time charterer of a vessel is necessarily a joint employer of the vessel's crew irrespective of the other attendant facts.

As Balboa Shipping Corporation does not operate its three vessels time chartered to UFCO and does not hire or otherwise deal with the seamen on such vessels or affect their terms and conditions of employment and as Empresa has, as noted, authority over such matters, Balboa is not under the present arrangement an employer of the seamen on its vessels.

[20] 130 NLRB No. 46, pg. 14-15. Clearly, the United States contacts derive from the fact that the maritime operations involved are those of a domestic corporation. They are not the result of the international operations of a truly independent foreign maritime venture.

10a Empresa's foreign incorporation, and the other foreign aspects present.[21] Accordingly, we conclude that Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding. Thus, the companies' motions to dismiss on jurisdictional grounds are denied.

2. The labor organizations involved claim to represent certain employees of the Employers.[22]

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within Section 9(c)(1) and Section 2(6) and (7) of the Act.[23]

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[21] See, also, *Peninsular & Occidental Steamship Co., supra; Eastern Shipping Corporation, supra;* and *Hamilton Bros., Inc., supra.*

[22] Following the close of the hearing in this case, Sindicato Maritimo Nacional De Honduras "Sindimar" sought to intervene in this proceeding on the basis of a card showing of interest. The Petitioner contends the request for intervention was not timely. We disagree, for the cards submitted in support of intervention were dated prior to the time of the close of the hearing. As we find that "Sindimar" is a labor organization, the motion to intervene is hereby granted. See, *Hamilton Bros. Inc.*, 133 NLRB No. . Sociedad Naccional De Marineros De Honduras was listed in the petition as the bargaining representative of the employees in the alleged appropriate unit and the record shows that, at the time of the hearing, a contract between Sociedad Naccional and Empresa covering the employees was then in effect. Copies of the petition, of the notice of hearing, and other formal papers were not served on Sociedad Naccional. However, on June 7, 1961, the Board issued a notice, served on the parties and Sociedad Naccional, in which, *inter alia*, it accorded that organization a right to intervene and state its position on the issues by filing within 25 days a "Statement of Intervention" and a brief. As Sociedad Naccional did not reply to the notice, we conclude it is not interested in being a party to this proceeding, and we therefore do not consider it to be one.

[23] We find contrary to the contention of Empresa that its contract with Sociedad Naccional in effect at the time the petition was filed but expiring in April 1961 is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: *St. Louis Independent Packing Company*, 122 NLRB 887, 889.

4. The following employees of the joint employers constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act: all seamen employed upon the vessels owned or managed by Empresa Hondurena De Vapores, S. A., and jointly operated by the Employers, excluding guards, masters, other licensed officers, and all other supervisors.[24]

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11 DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they well ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Na-

[24] The unit appears substantially as requested by the Petitioner. Empresa and UFCO did not contend the unit is inappropriate in either scope or composition, but object to the unit on the grounds considered above and found without merit, i.e., that UFCO is not an employer of the employees and that the Board is without jurisdiction in this case.

tional Maritime Union of America, AFL-CIO; or by Sindicato Maritimo Naccional De Honduras, "Sindimar;" or by neither.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman
BOYD LEEDOM, Member
JOHN H. FANNING, Member
GERALD A. BROWN, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS, MEMBER, dissenting:

For the reasons stated in my dissenting opinions in *West India Fruit and Steamship Company*, 130 NLRB No. 46, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, I would dismiss the petition herein.

Dated, Washington, D. C.

PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD

11a **Exhibit 1 (Continued)**

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY, Employer,

and

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Petitioner.

Order Correcting Decision and Direction of Election

On November 15, 1961, the Board issued a Decision and Direction of Election[1] in the above-entitled proceeding from which there was an inadvertent ommission.

[1] 134 NLRB No. 25.

IT IS HEREBY ORDERED that the aforesaid Decision and Direction of Election be, and it hereby is, corrected by adding the sentence "Under such a test no single contact is decisive." to page 3, line 8, after the word "interests."

IT IS FURTHER ORDERED that the Decision and Direction of Election, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., November 30, 1961

By direction of the Board:

HOWARD W. KLEEB
Associate Executive Secretary

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12 **Exhibit 1 (Continued)**

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY, Employer,

and

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner.

Order Amending Direction of Election

On November 15, 1961, the Board issued a Decision and Direction of Election[1] in the above-entitled proceeding and on November 30, 1961, an Order Correcting Decision and Direction of Election. Thereafter, having been advised by the Regional Director that a longer time in which to conduct the election is necessary, and having duly considered the matter,

IT IS HEREBY ORDERED that the Direction of Election be, and it hereby is, amended to provide for the conduct of the election at the discretion of the Regional Director.

Dated, Washington, D. C., December 5, 1961.

By direction of the Board:

HOWARD W. KLEEB
Associate Executive Secretary

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[1] 134 NLRB No. 25.

13 **Exhibit 2 to Complaint**

[SEAL]

NATIONAL LABOR RELATIONS BOARD
SECOND REGION
745 Fifth Avenue
New York 22, New York

Telephone Plaza 1-5500
November 21, 1961

Empresa Handurena de Vapores
Puerto Cortes
Honduras

Empresa Hondurena de
Vapores, S.A.
33 Rector St.
New York, New York
Re: United Fruit Company
Case No: 2-RC-10379

Gentlemen:

A conference will be held in my office on Friday, December 1, 1961, at 10:00 A.M., to arrange for the conduct of the election ordered by the Board in this matter.

Please be present and bring with you at that time a list of the employees who will be eligible to vote in accordance with the terms of the Direction of Election. This list should be in alphabetical order or in order of check numbers (including the clock number if the latter form is used), together with their job classifications, including employees who are ill, on vacation, or temporarily laid off.*

Very truly yours,

A. GENE NIRO
A. Gene Niro
Attorney

cc: White and Case
14 Wall St.
New York, N. Y.

Att: Orison S. Marden, Esq.

* NOTE: Also bring with you the date of arrival of the ships in U. S. ports aboard which employees in the unit are employed.

EMPRESA HONDURENA DE VAPORES, S.A. AUTHORIZED TRANSLATION OF COLLECTIVE CONTRACT FOR MARITIME WORK WITH SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS

EFFECTIVE APRIL 16, 1957

EMPRESA HONDURENA DE VAPORES, S.A.
AUTHORIZED TRANSLATION
COLLECTIVE CONTRACT FOR MARITIME WORK:

The undersigned, FRANCISCO COSENZA AREVALO, of age, married, merchant and residing in the Sectional District of Puerto Cortes, Department of Cortes, as party of the first part, acting in name and representation of the maritime workers association called "SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS", organized and existing under the laws of the Republic of Honduras, with head offices in Puerto Cortes, Department of Cortes, and recognized as a juridic person by the Executive Power in Acuerdo No. 1582 issued through the Ministry of the Interior, Justice, Sanitation and Public Welfare, under date of May 17, 1940; and Mr. Cosenza Arevalo acting as President of the Board of Directors of said Association and as its Representative, in accordance with the provisions of Article 27, Letter A) of its bylaws; and JOSEPH FELIX AYCOCK, of age, widower, Business Agent and with residence in the city of San Pedro Sula, D.D., Department of Cortes, as party of the second part, acting in name of and representation of the Corporation called "EMPRESA HONDURENA DE VAPORES, S.A." organized and existing under the laws of the Republic of Honduras, with head office in the port of Puerto Cortes, Department of Cortes, and recognized as a juridic person by the Executive Power in Acuerdo No. 1383 issued through the Ministry of the Interior, Justice, Sanitation and Public Welfare under date of March 28, 1941; and Mr. Aycock acting as President of the Board of Directors of said Corporation and as its legal representative, in accordance with the provisions of Article 26 of its bylaws; hereinafter the "Sociedad Nacional de Marineros de Honduras" shall be called "the Association" and the "Empresa Hondurena

de Vapores, S.A." shall be called "the Company"; and the parties Cosenza Arevalo and Aycock, in the name of their constituents, have agreed to enter into, as indeed by these presents they do enter into, the following collective contract for maritime work:

1. While this contract is in effect, the Company by these presents recognizes the Association as the sole representative of all seamen employed or to be employed on board the Honduran flag ships owned by, operated by, or for which the Company is agent, in all things pertaining to conditions of employment with the Company, or to the disputes, or controversies that may arise between said seamen and the Company regarding conditions of work on board the vessels or to the stipulation of this contract. Consequently all members of the Association that may be employed on the Company's ships shall be subject to and must comply with the stipulations of this contract.

2. This contract is applicable only to such seamen who are not required to put up a bond for the discharge of their duties or who do not hold on board a technical or professional position for the discharge of which a certificate of competence may be required, and therefore it shall not apply to the Captain and other Officers of the ship.

15 3. During the term of this contract the Company obligates itself to employ exclusively on board its ships, and the Association obligates itself to furnish seamen who are members of the association, after their status as such has been established, and who possess the required experience, knowledge and capacity for the performance of their duties on board; but if the Association does not have available or cannot furnish at any given moment the number of seamen of the specified qualifications requested by the Company, the latter may in that case employ seamen who are not members of the Association. It is also understood that this clause shall not hinder or restrict in any way the right which the Company has of reemploying and to continue employing and freely using such seamen who may return to work after an absence due to illness, accident, leave of absence or vacation.

4. Any seaman about to be employed on board the Company's ships shall have to be in good health and pass previ-

ously and successfully the medical examination prescribed by the Company, who may refuse employment to any seaman who, in the judgment of the Company's doctors may not possess the conditions of health necessary for the performance of the duties to be assigned to him on board.

5. During the life of this agreement the Company obligates itself to keep and maintain all of its vessels in a safe and seaworthy condition and at all times to maintain the lifesaving equipment, machinery, gear, and other equipment in good operating condition.

6. Whenever a Company's ship should be in a foreign port stranded or under repairs, or being cleaned, or for other reasons, and it should become necessary for these reasons to take her crew ashore, the Company agrees to continue paying to the members of the crew so landed their salaries as provided in Article 12 of this contract; and during the period that such members of the crew who are living ashore, the Company shall furnish them room and board at whatever appropriate place the Company may select, until such time as the ships shall be in condition to take the crew aboard, or until such time as such seamen shall be repatriated or transferred to the crew of another ship, whichever of these occurs first; it being understood that the Company shall have the option of giving in cash to each seaman in United States Currency, or its equivalent in Lempiras or in the currency prevailing in the place of payment, the cost of his room and/or board, which shall be per day per person the following:

a)	For Room Allowance	$3.00
b)	" Breakfast	1.25
c)	" Lunch	1.25
d)	" Supper	1.25

7. VENEREAL DISEASE: Whenever a member of the crew should be left on shore before the termination of his contract of engagement, for his medical treatment or hospitalization because he is impeded or unable to perform his duties on board the ship owing to some veneral or syphilitic disease, the Company shall have no obligation to support him or pay him any salary whatsoever while he remains on shore or during the duration of his illness, or while he

remains unable to perform his duties, or during the time after his recovery that he may have to wait to be re-employed on board; it being understood that if the Company should incur expenses for the board, lodging, treatment, hospitalization or medical attention of such seaman, such expenses shall be reimbursed by him to the Company in a proportion to be determined by the Company itself and through deductions that the Company shall make periodically from his salary.

Should the Company not re-employ such seaman, and he has been left on shore in a port other than the port of his engagement, it shall repatriate him as provided in Article 15 of this contract.

8. Every member of the association who is a member of the crew of any of the Company's ships shall at all times be under the orders of the Captain whose instructions and those of the officers of the ship he shall obey at all times. The Company may at any time dismiss any member of the crew whose services or conduct, in the judgment of the Company, may not be satisfactory, or if he should disobey the orders of the Captain and any other Officers of the ship, or for insubordination or disregard of the ship's discipline, without prejudice to other responsibilities to which he may be liable. In the event any seaman is so dismissed in a foreign port the Company shall repatriate him in the manner provided in Article 15 of this contract. Any member of the crew who considers that he has been unjustly dismissed may appeal the matter direct to the management of the Company. If the matter is not satisfactorily settled on this level, in such event, the matter shall be considered a dispute and must be handled and disposed of in the manner provided for in Article 11 of this contract.

9. Maritime Labor Accidents:

(a) It is agreed that any loss of life or any temporary or permanent incapacity that any seaman employed on Board a Company ship may sustain, while this contract is in effect, as a direct result of a maritime labor accident, shall be compensated by the Company in accordance with the provisions of Title XI of the Organic Law of the National Merchant Marine of Honduras (Decree No. 55 of

March 3, 1943.) It is further agreed that the accidents contemplated by this clause are those defined by Article 35 of said Law as maritime labor accidents.

(b) If a member of the crew, due to his temporary incapacity claimed by him to have been caused by an injury, wound or corporal infection classified as a maritime labor accident, stays or is left in port for his cure, medical attention or hospitalization, the Company shall pay him, pending investigation of such accident and while such seaman is on land receiving medical treatment, or waiting to be re-employed or repatriated, one-half of his monthly salary, (and also Four Lempiras (L. 4.00) per day for his maintenance and lodging during the time that he is not hospitalized). This payment shall end on the day that the incapacity is cured or declared to be a permanent one, or on the day that such seaman is re-employed or repatriated, whichever of these occurs first. If, as the result of the investigation, it is found that the incapacity in question was not caused by the alleged labor accident, and that the seaman is not entitled to the compensation provided in Article 44 of said Law, the seaman shall reimburse the Company the one-half monthly salary so paid him, such reimbursement to be made through periodic deductions that the Company shall make from the seaman's salary.

(c) If any member of the crew should lose his life as a result of such maritime labor accident, it is agreed that in the absence of a will left by such seaman designating a beneficiary of the death benefit provided in paragraph (d) of said Article 44 of Decree No. 55 of March 3, 1943, such death benefit shall be paid only to the legitimate or
17 aknowledged natural relatives of the seaman mentioned in numerals 1, 2, and 3 of said paragraph (d) of Article 44 of said Decree No. 55. Therefore, no such payment shall be made to the unrecognized natural descendants, ascendants, brothers or collateral relatives of the seaman.

(d) The Company may at its own option contract with private insurance companies for the payment of the compensations specified in the preceding paragraphs (a), (b) and (c), and if this should be arranged, the Company shall be relieved from the

obligation to pay said compensations, which shall then be paid directly by the insurance company engaged for the purpose.

10. The Company obligates itself to dismiss from its employ, upon termination of ship's voyage, any member of the crew, whom the Association may notify in writing that he is not an active member of the Association. The Association and the Company mutually agree that they will not discriminate against any man because of race, creed, or color.

11. It is agreed that during the term of this contract, there shall be no lockout ordered by the Company, nor declaration of strikes or suspension of work decreed by the Association or its members, on account of labor controveries or for any other causes. If any disputes or differences should arise between the contracting parties, it shall be resolved thus:

The matter in dispute shall be submitted to the decision of two arbitrator[s] of fact, one named by each party who shall be impowered to name a third in case of discord between said arbitrators. If any of the contracting parties should fail to name its arbitrator within ten days after being called upon to do so, or if the arbitrators named by the parties should not agree in naming a third, in that case the Commandant of the Honduran port of arrival of the ship shall make the appointment. The decision of the arbitrator of fact, or of the third in its case, shall be final and binding to the parties, and against it there shall be no appeal whatsoever, producing the effect of a firm sentence with the authority of "res judicata".

Any dispute arising during the voyage of a ship, shall be resolved in the manner prescribed in this article as soon as the vessel reaches a Honduran port, but if the vessel is not returning to Hunduras within a term of 60 days, then the dispute shall be submitted abroad to the decision of the Official or person designated by the Government of Honduras for that purpose, and his decision shall have the same final effect as the decisions of the aforesaid arbitrators of fact.

12. Wages: During the term of this contract, the Company shall pay to the rating listed below, when carried the

following monthly wages in United States Currency, or its equivalent in Lempiras or in the currency prevailing in the place of payment:

I. Deck Department

Carpenter	$160.00	
Boatswain	153.50	
Carpenter-Boatswain	160.00	
A. B. Seaman	140.00	
Ordinary Seaman	120.00	
*First Pumpman	166.00	
*Second Pumpman	153.50	
*Storekeeper	148.00	
*Painter	140.00	

* F. R. Hart only

18 II. Engine Department

Oiler	151.00	
Fireman for Oil Burning Vessels	140.00	
Wiper	125.00	
Utility Man	125.00	

III. Steward's Department

Chief Steward and Cook	$210.00	
Chief Cook	210.00	A
Chief Cook	196.00	B
Second Cook	160.00	
Baker	160.00	
Second Cook and Baker	175.00	C
Second Cook and Baker	162.00	D
Second Cook and Baker	156.00	E
Utilityman	125.00	
Endman	120.00	
Saloonman	132.00	
Officers' Messman	125.00	
Messman	120.00	
Messboy	115.00	

A—On the steamships *MUSA, PLATANO, IRIONA, LA PLAYA, AZTEC, TOLTEC, MAYA, MABAY, MANAQUI, COPAN, CHOLOMA, CHOLUTECA, F. R. HART, ALMIRANTE, ARAGON, ATENAS.*

B—On the steamships *LEMPA, LEON, TELDE, OROTAVA.*

C—On the steamships *IRIONA, AZTEC, TOLTEC, MAYA, MUSA, PLATANO, F. R. HART, PALMIRANTE, ARAGON, ATENAS.*

D—On the steamships *LA PLAYA, MABAY, MANAQUI, COPAN, CHOLOMA, CHOLUTECA.*

E—On the steamships *TELDE, OROTAVA, CUBAMA, LEMPA, LEON.*

These wages shall be paid from the day when the seaman signs the roll of the crew until the day his services cease on board. Any seaman who fails to sail with his ship at the specified time shall lose his rights to salary from that date.

13. VACATIONS: After one year of continuous service on the Company's vessels, the Company shall grant annually to each member of the crew enumerated in Clause 12 vacation with pay, thus:

(a) After the first year of continuous service, seven calendar days' vacation.

(b) After two years of continuous service the Company shall grant an annual vacation of fourteen calendar days.

(c) After five years of continuous service the Company shall grant an annual vacation of 21 calendar days.

(d) The continuity of services for the purposes of this article will not be considered interrupted by leaves of absence granted for sickness, accident or granted for other legitimate reasons nor for time lost due to lay-offs. Nevertheless said periods of absence from active service will not be counted in computing the year's service for the granting of vacations.

Said vacations may be accumulated up to a total not to exceed 28 calendar days, it being understood that the Com-

pany shall grant vacations at the time of the year most convenient to it, or when its maritime services permit.

19 14. ILLNESSES:

(a) NONOCCUPATIONAL AND NONCULPABLE ILLNESS: If any member of the crew should become ill on board the ship and he should be left on shore for his care, and if the illness is not occupational and does not proceed from a culpable act of the seaman himself, the Company shall pay him for its own account his medical, surgical, pharmaceutical and hospitalization expenses, (and also FOUR LEMPIRAS (L.4.00) per day for his maintenance and lodging during the time that he is not hospitalized), it being understood that the Company shall make these payments until the seaman is cured or until the illness is declared incurable or of a permanent character, or until the seaman is re-employed or repatriated, whichever of these occurs first, but in no case shall the Company make these payments when the illness proceeds from the culpable act of the seaman himself.

(b) OCCUPATIONAL ILLNESS: If a member of the crew should be left on shore due to his having contracted on board in the service of the ship an occupational illness not caused by his own fault, the Company shall pay him for its own account, while he remains ashore undergoing medical and hospital treatment, one-half of his monthly salary and also his medical, surgical, pharmaceutical and hospitalization expenses, (and in addition FOUR LEMPIRAS (L.4.00) per day for his maintenance and lodging during the time that the seaman is not hospitalized) until the seaman is cured and has been declared fit for duty, or until his occupational illness is declared incurable or of a permanent character, or until the day that such seaman is re-employed or repatriated, whichever of these occurs first, these payments to be continued in the event that such seaman is repatriated before he is cured or before his occupational illness is declared incurable or of

a permanent character. It is expressly understood that all of these payments shall be made in lieu of the benefits provided in paragraphs 1 and 2 of Article 42 of Decree No. 55 of March 3, 1943. Likewise if the occupational illness is declared incurable or of a permanent character, such crew member shall receive such benefits as are provided in Article 44 of said Decree No. 55, according to the degree of his permanent incapacity caused by such occupational illness.

For the purposes of this Article the term "occupational illness" shall be understood to mean any illness which a crew member may contract on board the ship as the immediate consequence and direct result of the work that he performs on board. Hence, any other illness not falling within this definition does not confer any rights to the benefits provided in this Article but are controlled by the provisions of Article 7 and paragraph (a) of Article 14 of this contract.

15. REPATRIATION: Whenever any member of the crew is left on shore, *in a port other than the port of engagement*, due to his illness, injury, discharge, shipwreck, or for any other cause, the Company shall repatriate him for its own account to the port of engagement, or to the port where the voyage began, or to the port which he and the Company may mutually agree upon. Such repatriation shall cover only the cost of transportation and maintenance of the seaman during the trip. If the seaman is able to work, the Company may discharge its obligation to repatriate him by providing him employment aboard any Company vessel proceeding to the port of repatriation.

16. HOURS OF WORK: The hours and working conditions for members of the crew shall be as follows:

(a) *Deck and Engine Department:*

The regular working hours for day workers will be eight hours per day, Monday through Friday and four hours on Saturdays in the forenoon, both at sea and in port. Overtime will be paid for any work in excess of eight hours per

day Monday through Friday, and work in excess of four hours on Saturday and for any work performed on Sunday or holidays, at the overtime rate stipulated in paragraph (a) of this article.

The regular working hours for men on watch shall be eight hours per day at sea and in port provided, however, that overtime will be paid for any work performed in any port on Saturday afternoon, Sundays, or Holidays at the overtime rate stipulated in paragraph (h) of this article.

(b) *Steward's Department:*

The regular working hours for members of the Steward's Department shall be eight hours daily in a spread of fourteen hours both at sea and in port provided, however, that any work performed in excess of such hours and any work performed in any port on Saturday afternoon, Sunday or Holidays shall be paid for at the overtime rate stipulated in paragraph (h) of this article.

(c) At sea and in ports other than Honduran and Continental U. S. Ports no work other than usual routine duties shall be performed on Sundays or Holidays.

(d) HOLIDAYS:

The following Holidays will be observed: January 1st, March 15th, April 14th, May 1st, September 15th, October 3rd, October 12th, December 25th, Holy Thursday, Good Friday, and Saturday of Holy Week.

(e) STEVEDORING CARGO:

Any work performed by members of the crew in connection with the stevedoring of cargo, will be paid for at the overtime rate stipulated in paragraph (h) of this article.

(f) DRILLS:

Boat and fire drills and other emergency work performed for the safety of the ship, its passengers, its crew or cargo or for the salvaging or aiding of other vessels in distress including their crew, passengers and/or cargoes shall not be considered overtime no matter when or where performed.

(g) COMPUTATION OF OVERTIME:

Ovrtime shall be computed on the basis of half-hour periods, it being understood that any fraction of half-hour shall be considered a full half-hour.

21 (h) OVERTIME RATE:

The overtime rate for all departments shall be ($1.00) one dollar per hour U. S. Currency or its equivalent in Lempiras or in the currency prevailing in the place of payment and the said overtime shall be paid in cash at the completion of each voyage.

(i) The Boatswain and or Carpenter shall perform the usual routine soundings and inspections on Saturdays, Sundays and Holidays without the payment of overtime.

(j) It is mutually understood and agreed that a vessel shall not be considered in port while at anchor. Nevertheless, when the vessel is anchored on a Saturday afternoon, a Sunday or on any of the holidays stipulated in section (d) of this article crew members will be paid for work done in accordance with sections (a) and (b) of this same article.

17. The purpose of the contracting parties in signing this contract is to continue working in complete harmony and cooperation for their mutual benefit, and principally to continue fomenting the development of the Honduran Merchant Marine to the end that it may occupy its proper place in the international maritime commerce.

18. Both parties being fully aware of the unsettled world-wide conditions and being desirous of protecting the interests and providing for the welfare of the seaman employed by the Empresa Hondurena de Vapores, S. A., in the event that the vessels owned by the Company should during the life of agreement, operate under war conditions, do agree that in that event the seaman employed on vessels operated by the Empresa Hondurena de Vapores, S. A., will be paid the identical bonuses percentage-wise and the identical compensation for death as a result of war hazard and or temporary and or permanent disability as a result of war hazard and loss of personal effects as are paid to seamen employed in the Merchant Marine of the United States.

During the period that any vessel of the Company is under charter to any agency of the United States Government, the members of the crew of such vessels, in lieu of the benefits mentioned in the paragraph above, shall be entitled to the bonuses and to the benefits for death, body injury, loss of personal effects and internment resulting from risk of war or war-like operations, as may during the term of such charter be provided with respect to the crews of vessels documented under the laws of the United States and under charter to any agency of the United States Government and during the period that the payment of such benefits are insured or assumed by the charterer, the Company shall be relieved of any and all liability to the members of the crew or their beneficiaries under the provisions of this agreement.

Whenever any of the foregoing contingencies should take place, the Empresa wil notify the Sociedad of such occurrences.

19. TERM OF CONTRACT:

This contract shall become effective at 12:01 A. M. April 16, 1957, and shall remain in full force and effect until midnight of April 15, 1959, and shall be considered automatically renewed for an equal term and so on successively if before 30 days prior to its expiration date one of the contracting parties has not notified in writing the other party its decision to terminate the contract; it being expressly agreed and understood that the contract entered into between the same contracting parties on April 11, 1955, is hereby terminated as of midnight April 15, 1957.

22 IN WITNESS WHEREOF, Mr. Francisco Cosenza Arevalo, in his character of President of the SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS and in accordance with the faculties vested in him by the by-laws of the said Sociedad in Capter 111, Article 27, Paragraph (eh) and Mr. Joseph Felix Aycock in his character of President of the EMPRESA HONDURENA DE VAPORES, S. A. duly authorized therefor, signed this contract before two witnesses, in the city of Puerto Cortes, Sectional District of Puerto Cortes, Depart-

ment of Cortes on the 29th day of March nineteen hundred and fifty seven:

J. F. Aycock
President of the
"Empresa Hondurena de Vapores, S. A."

F. Cosenza
President of the
"Sociedad Nacional de Marineros de Honduras"

Efrain Alcantara
Witness

F. B. Acosta
Witness

23 The undersigned Notary Public, with residence at the present time in the city of San Pedro Sula, D. D., Department of Cortes, and at present in this Port

Certifies: That the signatures which read: "J. F. Aycock" and "F. Cosenza", appearing at the end of the Collective contract for Maritime Work, entered into between the Empresa Hondurena de Vapores, S. A., and the Sociedad Nacional de Marineros de Honduras, are authentic and have been placed thereunto in his presence by Messrs. Joseph Felix Aycock and Francisco Cosenza Arevalo, in their character of Presidents, respectively of the aforesaid societies, and that they are personally known to him: and He Further Certifies: That the signatures which read "Efrain Alcantara" and "F. B. Acosta" and which likewise appear at the end of the aforesaid contract are authentic and have been placed thereunto in his presence by Messrs. Efrain Alcantara and Francisco B. Acosta whom he knows personally and who sign said document in their character of witnesses.

In Witness Whereof he signs and seals these presents in Puerto Cortes, Sectional District of the same name, Department of Cortes, on the 29th day of March nineteen hundred and fifty seven.

Guillermo Moncada
Notary

24 **Exhibit 3.**

Photostatic Copy of Spanish Text.

(Omitted in printing)

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43 **Exhibit 4 to Complaint.**

(Translation)

MINISTRY OF STATE
FOR
LABOR AND SOCIAL WELFARE

CERTIFICATION

THE UNDERSIGNED SECRETARY OF THE MINISTRY OF STATE FOR LABOR AND SOCIAL WELFARE in the action initiated by virtue of the petition presented to this Ministry of State by Mr. Joseph Felix Aycock, in his capacity as President of the Empresa Hondurena de Vapores, S.A., CERTIFIES: the opinion and decision literally state:

"The undersigned Chief of the Legal Section of the Office of the Inspector General of Labor in accordance with the preceding decision, hereby submits the following OPINION.— The Republic of Honduras is an Independent and Sovereign State with its own nationals and territory, legally established, subject to and obeying a Constitution and the laws and regulations derived therefrom and which in conjunction form the Honduran Judicial System. As a State which it is, it is Sovereign, a factor which is of extreme importance in International Law and which forms the fundamental basis for the opinion which is herein expressed, for as there is no other judicial power of a higher hierarchy than that of Sovereignty, there exists only the self-imposed limitations of the Individual States which gives a reason for the peaceful coexistence of these States within the Judicial System known as Public International Law. If this were not the case, it would be possible for the government of one nation, for example, to dictate unilaterally dispositions which could affect the sovereignty and jurisdiction of another state; which, in turn, and as reprisal, could dictate dispositions covering matters which legally pertain to the first and thereafter successively until the entire civilized

world would be transformed into a state of chaos due to constant tensions and innumerable wars, depending upon the power of some and the weakness of others, Fortunately, man has found the means of voluntarily imposing a limitation upon the Sovereignty of each State by means of international treaties, or simply by unilateral action under the existing laws. We have, therefore, Honduras, a civilized country, respectful of International Law which, in accordance with Article 11 of its Constitution has adopted and recognizes as its own the principles and practices of an international order which recognize the community of man and the sovereignty of nations and their desire for peace and universal democracy, and to such extent it would never presume to order the other Central American Republics to alter in any way their political status, the control over their people or their judicial institutions, or even to attempt to have their courts decide in any given manner matters over which they have jurisdiction, or even to attempt to take from the jurisdiction of these foreign courts matters which in accordance with their own jurisprudence, are wholly within their jurisdiction, and we could go on and on and mention many other instances of possible inferences in questions of International Jurisprudence which would only be limited by one's imagination. However, we repeat that man has found the solution to this problem because there exist internally laws which restrict the actions of each State, International Codes which resolve conflicts of law and finally International Conventions which proscribe the intervention of one State in the internal affairs of another, which condemn the theory of rule
44 by the strongest and raising to a very high plane the concepts of law and the peaceful solution of international controversies. Article 6 of the Constitution of the Republic of Honduras fixes the national territorial boundaries in such a detailed manner and conforms these with the decisions of arbitration commissions that the Honduran authorities charged with the enforcement of laws with regard to specific cases would never reach the extreme of usurping the rights and actions of other States by virtue of an error in political geography. The doctrine and conventions relating to private International Law, for example, the Bustamante Code, approved by the 6th Inter-

American Conference at Havana, Cuba, in 1928, refers to the following classification of laws. 'I. Those applying to persons by reason of their domicile or their nationality and following them even when they go to another country termed personal or of an internal public order; II. Those binding alike upon all persons residing in the territory, whether or not they are nationals termed *territorial, local or of an international public order;* III. Those applying only through the expression, interpretation, or presumption of the will of the parties or of one of them, termed voluntary or of a private order.' Private International Law recognizes among those laws which are classed as territorial the Political Constitutions and Labor Laws, in addition to criminal and administrative and procedural law; that is to say, these laws are applied equally to those who reside within the territory of the State in question without regard to nationality. This means that a worker or an employer domiciled in Honduras, even though they may be foreigners or have tried voluntarily to free themselves from the jurisdiction of the *territorial* laws of Honduras, cannot limit the celebration of a work contract to the laws of a foreign country. Much less can a foreign judicial body declare itself competent to consider a labor matter originating in Honduras, as we will demonstrate further on. It is established, therefore, that the provisions of a constitutional or labor character, among others, have the nature of being territorial laws and obligate all persons residing in Honduras without regard, as is reasonable, to the personal laws of individuals, under which it would be possible to grant the application of certain foreign legal provisions within the national territory, for example, those relative to the civil status of persons. As we are actually concerned with the substantive aspects of the problem presented by the Empresa Hondurena de Vapores, S.A., we will refer to the Charter of the Organization of American States subscribed to generally by all of these countries and specifically by the United States of America and the Republic of Honduras on April 30, 1948, in the City of Bogota, Republic of Colombia. In Article 5 of this Charter there is contained a reaffirmation of the principles by the American States and under paragraph b) of said Article they reaffirm that 'b) International order consists essentially of respect

for the personality, *sovereignty* and independency of States, *and the faithful fulfillment of obligations derived from treaties and other sources of international law.*' As an example of the limitation of the Rule by the Strong which distinguishes us today from those who lived in the dark ages of man; Article 6th of the Charter proclaims that 'States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.' Strengthening the above principle, Article 7 of the Charter imposes the following obligation: 'Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law', and in Article 8 the Charter states that 'The fundamental rights of States may not be impaired in any manner whatsoever.' We affirm that one of the fundamental rights of a modern state is its unrestricted rights with respect to its own legislative, administrative and judicial functions with respect to its own area and the validity of its laws. The above citations are enough to demonstrate the illegality of the action on the part of the National Labor Relations Board of the United States when it sought to exercise jurisdiction over a matter which is properly within the jurisdiction of Honduran Courts, in that without any logical reason whatever it ordered that the Empresa Hondurena de Vapores, S.A. recognize an American Maritime Union as the representatives of that Company for the negotiation and execution of a collective bargaining contract; however, we feel that it is our duty to study this matter further with respect to the Charter of Organization of American States and point out that its terms and conditions obligate all Nations of this Continent, whether they be large or small, strong or weak. We place specific emphasis on the following articles: 'Article 12. The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.' Article 15. 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also

any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.' As you can see, we have now reached the question of jurisdiction. Would the Government of the United States recognize as being legal the action by a Judge of the Republic of Honduras which would tend to bring under his jurisdiction matter X which properly should fall within the jurisdiction of the Courts of the United States? If by the mere fact that there are Honduran seamen who serve on ships which sail under the flags of the United States would this give to the Government of Honduras jurisdiction over labor matters involving these seamen, and would the Government of the United States consider it as being legal, realizing that its labor laws are territorial in nature and as a result applicable to the last inch of United States territory and to the ships which fly its flag for the reason that these ships are an extension of its national territory? We think that the answer would be in the negative and therefore it is reasonable to assume that the Government of Honduras would also refuse to accept as valid any decision handed down by any Court of any foreign country which attempts to apply to persons having their domicile in Honduras and who in accordance with the classification of laws above cited are subject to the jurisdiction of its territorial laws. The Constitution of the Republic, which is the source of International Law, establishes in Article 122 the jurisdiction over labor matters and states that it shall have jurisdiction over all controversies which originate as a result of the relations between capital and labor and states clearly that the respective laws shall establish the norms of this jurisdiction and the agencies which shall be responsible for putting them into effect. The law, has effectively established the jurisdiction over labor matters creating courts and tribunals necessary to mete out justice in labor matters. In the City of Puerto Cortes, situated in the Department of Cortes, which is a part of the national territory, there is a Labor Court and within its jurisdiction is the domicile of the Empresa Hondurena de Vapores, S.A., as well as the domicile of the seamen who work for this Company. Therefore, any controversies which arise between these parties are subject in accordance with the provisions of the

Constitution and the law, to said Labor Court. We
46 take into consideration that the ships of any nation actually constitute an extension of the national territory of that nation. We can show that the National Maritime Union of the United States under the provisions of the Labor Code in force in Honduras is not legally the representative of the workers of the Empresa Hondurena de Vapores, S.A., but we are not concerned with this matter, but merely wish to demonstrate, as we have demonstrated, the illegality of the resolution handed down by the National Labor Relations Board of the United States, based on the irrefutable argument that *it does not have jurisdiction over the matter which it has attempted to resolve*. As this 'Decision' stands, in the future the Government of the United States will have to recognize that all decisions handed down by the Courts or Tribunals of Honduras which involve conflicts between Honduran seamen on ships of the United States Merchant Marine shall be valid; this situation would merely be with respect to Honduras, for it is very easy to imagine that a like position could be taken by other countries stronger than Honduras and we feel certain that this would not be well received by the United States of America. The Bustamante Code, in Article 423, paragraph 3, establishes that 'Every civil or contentious administrative judgment rendered in one of the contracting States shall have force and may be executed in the others if it combines the following conditions: That the judgment *does not* conflict with the public policy or the public laws of the country in which its execution is sought.'. The resolution handed down by the National Labor Relations Board of the United States referred to in the petition of the Empresa Hondurena de Vapores, is in conflict with the Constitutional, Labor and Procedural Law of Honduras, which are all a matter of Public Law. In conclusion, we have reached the following opinion with respect to the Petition filed by the Empresa Hondurena de Vapores and state as follows: 1. That in accordance with the Labor Laws of Honduras a foreign Tribunal or agency cannot intervene in a labor matter which involves a Honduran shipping company and the seamen who work on its ships which fly the Honduran flag, as we consider that these ships are actually merely an extension of the national territory;

2. That no foreign union can represent the interests of seamen who work on ships sailing under the Honduran flag; 3. That any resolution or decision of a foreign tribunal or agency which conflicts with what has been expressed under 1 and 2 above, is null and void in accordance with the Honduran Constitutional, Labor and Procedural Law. Tegucigalpa, D. C., December 7, 1961. (Signed) ADALBERTO DISCUA R., Chief of the Legal Section of the Office of the Labor Inspector General.

"MINISTRY OF STATE FOR LABOR AND SOCIAL WELFARE. Tegucigalpa, Central District, December 8, 1961. I hereby approve in all parts the opinion handed down by the Legal Section of the Office of the Inspector General of Labor. Extend a certified copy to the interested parties. EXECUTED. OSCAR A. FLORES (Seal) Minister of State for Labor and Social Welfare. ANGEL LEVY CASTILLO Seal of the Secretary's Office."

Extended in Tegucigalpa, Central District, the 8th day of December 1961.

(SEAL)
ANGEL LEVY CASTILLO,
(SEAL) Secretary of the Ministry of Labor,
Approved
s OSCAR A. FLORES
Minister of Labor

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47 (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMPRESA HONDURENA DE VAPORES, S.A., *Plaintiff*,

against

IVAN C. MCLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Defendant*.

Order to Show Cause and Affidavit—December 12, 1961

61-4413

Upon the verified complaint herein and the affidavit of Orison S. Marden, sworn to December 12, 1961, it is

ORDERED, that the defendant show cause before this Court in Room 506, at the United States Courthouse, Foley

Square, New York, New York, on December 14, 1961, at 4:00 P.M., or as soon thereafter as counsel can be heard, why an order should not be made herein temporarily enjoining defendant, Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, his agents, servants, employees, attorneys and all persons acting for and in concert with him, from carrying out a Decision and Direction of Election of the National Labor Relations Board made on November 15, 1961 directing a representative election among the unlicensed seamen employees of Empresa Hondurena de Vapores, S.A., a foreign corporation having its principal place of business at Puerto Cortes, Republic of Honduras, which election is presently scheduled to take place commencing on December 17, 1961 on board vessels owned and or operated by plaintiff upon their arrival in ports of the United States between December 17, 1961 and January 31, 1962, and by mailing ballots to said employees not aboard vessels scheduled to call at United States ports between said dates, to be returned to defendant at the office of the Board for the Second Region on or before February 15, 1962, pending the final hearing and determination of this action; and it is further

ORDERED that service of copies of this Order to Show Cause, the affidavit of Orison S. Marden, sworn to December 12, 1961 and the summons and complaint herein be made by a United States Marshal or Deputy, upon United States by delivery of copies thereof to the United States Attorney for the Southern District of New York and by sending copies thereof by registered mail to the Attorney General of the United States at Washington, District of Columbia, and upon defendant Ivan C. McLeod, Regional Director for the Southern Region of the National Labor Relations Board, or upon a person in charge of his office at 745 Fifth Avenue, New York, N. Y., on or before December 13, 1961, by 12:30 P.M. shall be deemed good and sufficient service.

Dated: New York, New York,
December 12, 1961

EDMUND L. PALMIERI
U. S. D. J.

48 **Affidavit of Orison S. Marden—December 12, 1961**

(Title omitted)

STATE OF NEW YORK }
CITY OF NEW YORK } ss.:

ORISON S. MARDEN, being duly sworn, says:

I am one of the attorneys for the plaintiff in this action and make this affidavit in support of an application by plaintiff for an order temporarily restraining and enjoining the defendant from carrying out a Decision and Direction of Election made by the National Labor Relations Board on November 15, 1961, pending the trial of this action.

This affidavit is made by me and not by an officer or director of plaintiff because all of plaintiff's officers and directors reside in the Republic of Honduras and none are now within the United States.

Except as stated below, I believe that the allegations of the complaint are based entirely on the sworn testimony and exhibits introduced at the proceeding before the National Labor Relations Board which resulted in the decision complained of. As will appear from the brief to be submitted in support of plaintiff's application, there is no dispute concerning the decisive facts which demonstrate that the Board was without jurisdiction to make the Decision and Direction of Election which defendant is carrying out.

The exceptions to the facts as presented in the record before the Board, relate to the number of merchant vessels owned by plaintiff and the number of unlicensed seamen employed thereon. Upon information and belief, plaintiff now owns and/or operates 13 seagoing vessels (as compared with 17 at the time of the hearing before the Board) and now employs approximately 335 unlicensed seamen (as compared with approximately 460 at the time of the hearing before the Board). These changes have occurred due to the sale, for scrap of 4 vessels which became obsolete. The sources of my information and grounds for my belief as to such changes are statements made to me by agents of the plaintiff.

In view of the fact that defendant has scheduled the election among plaintiff's employees commencing December 17, 1961, plaintiff requests this Court to grant an order

enjoining the defendant from carrying out the Decision and Direction of Election dated November 15, 1961 pending the trial of this action.

49 An order to show cause is requested for the reason that there will be insufficient time to give the regular notice of motion so as to bring on this application with expedition and before the commencement of the conduct of the election on December 17, 1961.

No previous application has been made for the relief requested in the attached order to show cause.

ORISON S. MARDEN
Orison S. Marden

Sworn to before me December 12, 1961.
ROBERT A. PERKINS
Robert A. Perkins
Notary Public, State of New York
No. 41-8327500, Queens County
Certificate filed in New York County
Term Expires March 30, 1962

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50 Certificate of service

(Omitted in printing)

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51 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

61 Civ. 4413

EMPRESA HONDUREÑA DE VAPORES, S.A., *Plaintiff*,

v.

IVAN C. MCLEOD, as Regional Director of the Second Region of the NATIONAL LABOR RELATIONS BOARD, *Defendant*.

Motion of Defendant Regional Director to Dismiss the Complaint—December 13, 1961

Defendant, by his attorneys, moves that the complaint herein be dismissed for the following reasons:

1. This Court lacks jurisdiction over the subject matter of this action.

2. Plaintiff seeks premature judicial relief.

3. This Court lacks jurisdiction over the members of the Board who are indispensable parties to the action.

4. In any event, the Board's assertion of jurisdiction and its Decision and Direction of Election were proper.

WHEREFORE, it is respectfully requested that defendant's motion to dismiss be granted.

/s/ MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1717 Pennsylvania Avenue, N.W.
Washington 25, D. C.

Dated at Washington, D. C.,
this 13th day of December, 1961

(SEAL)

A True Copy,
HERBERT A. CHARLSON,
Clerk

By CATHERENE B. SALAMONE,
Deputy Clerk

(File endorsement omitted)

52 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civil 4413

EMPRESA HONDUREÑA DE VAPORES, S.A., *Plaintiff*,

against

IVAN C. McLEOD, as Regional Director of the Second Region of the NATIONAL LABOR RELATIONS BOARD, *Defendant*.

Opinion—December 16, 1961

PALMIERI, J.

This is a motion[1] for a preliminary injunction restraining defendant[2] from carrying out an order of the National Labor Relations Board (Board) directing a representation

election among the unlicensed seamen employees of Empresa Hondurena de Vapores, S.A. (Empresa). A complaint seeking permanent injunctive relief was filed simultaneously with the motion papers.

The election has been ordered to commence on December 17, 1961, on vessels owned or operated by plaintiff upon their arrival in United States ports and by mailing
53 ballots to employees not aboard vessels scheduled to arrive in the United States between December 17, 1961 and January 31, 1962. Plaintiff is a Honduras corporation, operating vessels registered under the laws of Honduras and carrying the Honduran flag. The unlicensed seamen employed by plaintiff are, with the exception of one who is a citizen of Jamaica, all citizens of Honduras and, with the exception of four, all residents of Honduras. All are also members of a Honduran labor union, Sociedad Nacional de Marineros de Honduras,[3] which is certified by the Ministry of Labor of Honduras. Empresa is, however, a wholly owner subsidiary of United Fruit Company (United Fruit), a New Jersey corporation with its principal place of business at Boston, Massachusetts. Since its formation of Empresa , with few possible exceptions, chartered all its vessels to United Fruit which uses them, for the most part, to carry produce of United Fruit's Latin American operations. It is the plaintiff's position that the Board, in making the order here in question, exceeded its powers under the Labor Management Relations Act of 1947, 29 U.S.C. Chapter 7, inasmuch as this Act has been
54 held by the Supreme Court of the United States[4] to be inapplicable to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers. The plaintiff urges, in addition, that the Board's direction that the representation election be held, presents a substantial Constitutional question: that such action is in contravention of treaty obligations with the Republic of Honduras and therefore violative of Article VI of the Constitution.[5]

The Jurisdiction of this Court to Grant the Relief Requested by the Plaintiff

At the very outset, it is necessary to consider the Board's objection that this Court lacks jurisdiction over the sub-

ject matter of this action. The objection is based upon the proposition that an employer is not entitled to invoke the jurisdiction of a federal district court to review the Board's direction of a representation election because an adequate and exclusive statutory method of obtaining judicial review by the appropriate Court of Appeals has been provided.[6] The plaintiff, on the other hand,
55 relies on the frequency cited and much discussed decisions in *Leedom* v. *Kyne*, 358 U.S. 184 (1958); and *Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949).

On the one hand there can be no doubt that the Labor Management Relations Act of 1947 manifested a clear Congressional recognition that to achieve the statute's basic policy of promoting collective bargaining dilatory litigation had to be avoided; that a restriction of the scope and method of review of labor determinations tended to achieve this result; and that such restriction tended to promote the efficient functioning of the Board as well.[7] Thus, it has come to be generally recognized that Board determinations in representation proceedings are not reviewable by district courts under their general equity jurisdiction.[8] But this generally settled rule is subject to two exceptions —those established by the two decisions upon which the plaintiff relies. The nature of these exceptions and their impact upon the general rule were succinctly explained by Judge Friendly in a recent opinion, *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127, 129-130 (2d Cir. 1960):

56 "Subsequently, two exceptions to this general rule excluding District Court jurisdiction to enjoin Board directions in representation matters have been recognized. The first was this Court's decision in *Fay* v. *Douds*, 2 Cir., 1949, 172 F. 2d 720, 723, relating to cases where the plaintiff advances a claim of denial of constitutional rights, in that case lack of procedural due process, which is 'not transparently frivolous.' Thereafter a second exception was announced, first by the Court of Appeals of the District of Columbia and later by the Supreme Court, in *Leedom* v. *Kyne*, 1957 101 U.S. App. D.C. 398, 249 F. 2d 490, 1958, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, where the Board had acted in direct and in that case conceded contravention of a specific mandate of § 9, there § 9(b) (1)."

Since there is no claim here of the board's violation of any statutory mandate, the *Leedom* v. *Kyne* exception does not apply. But there is present in this case the assertion of the deprivation of several Constitutional rights. Only one need be referred to since it is plainly one which is "not transparently frivolous."[9] It is urged not only by the plaintiff, but by the Attorney General of the United States when he intervened before the Board in these proceedings as amicus. At page 11 of his brief he stated:

57 "A refusal to treat merchant vessels flying the flag of Liberia and Honduras as vessels of those nations would be in direct conflict with our treaty obligations and would, as the Under Secretary of State has pointed out in his letter of October 27, 1960, to the Attorney General, a copy of which is included as Appendix A, create serious difficulties in our foreign relations not only with nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize the flag of the ship as a violation of the rules of international law upon which there had been mutual reliance."

Moreover, the Attorney General appended to his brief a communication from the Department of State signed by Under Secretary Douglas Dillon, dated October 27, 1960, expressing the Department's interest in these proceedings "based upon the important foreign relations considerations involved" and added, in part, as follows (p. 24 of Attorney General's brief):

"The Department of State believes that a proper reading of these Treaties requires that vessels under the flag of Liberia and Honduras and carrying the papers required by the national laws of those countries in proof of nationality, be recognized by the United States Government or any agency thereof as having the nationality of those countries. Therefore, the Department considers that any action by the Board purporting to consider such vessels as United States flag vessels, would be subject to a charge of violation of the above international agreements."

58 I cannot go so far as to say that a treaty violation may occur. It would seem sufficient, on the jurisdictional aspect of this case, to point out the formal assertions of important officials of the executive branch of the Government which tend to substantiate the plaintiff's claim on this point. I conclude, therefore, that there is present in this case one of the two grounds set forth by Judge Friendly permitting the assertion of jurisdiction by the District Court.

The Plaintiff's Entitlement to Injunctive Relief

Assuming the valid assertion of jurisdiction by the District Court, I shall now deal with the considerations affecting the disposition of plaintiff's request that it be granted threshold injunctive relief. At the outset, I am not convinced of the probability of the plaintiff's success in sustaining the legal contentions in this case. I am constrained to note that although the Attorney General intervened before the Board, he has been silent before this Court. It may be, as the Board urges, in its own behalf, that
59 the Attorney General believes that resort to the Court is, in any event, premature because the election sought to be enjoined is an interlocutory step in a representation proceeding, and it may lead nowhere if neither union wins. It is only if one of the two unions on the ballot wins, and it is certified by the Board as the collective bargaining representative that plaintiff will be placed under a legal obligation to bargain. And even in this contingency, the legal obligation is not enforceable until reviewed by the appropriate Court of Appeals as already stated. The plaintiff's assertions of immediate and irreparable damage by the holding of the election, without more, are unproved and unconvincing. It is not possible, on the record before me, to conclude that the plaintiff will suffer irreparable harm solely as a consequence of the holding of the election. I feel constrained to conclude that the interests of the many parties involved, particularly in the light of the lengthy and painstaking inquiry by the Board, do not justify the grant of the drastic threshold sanction invoked by the plaintiff.

60 Accordingly, the plaintiff's motion for a preliminary injunction is denied. It is so ordered.

Dated: New York, N.Y.
December 16, 1961.

/s/ EDMUND L. PALMIERI
U. S. D. J.

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[1] The motion was brought by an order to show cause submitted Wednesday and returnable late in the afternoon of the Thursday preceding the Sunday on which the election was scheduled to commence, thus giving adverse parties little time in which to respond and forcing the Court to decide the complex questions of jurisdiction and injunctive relief under pressure of severe time limitations. Considering that the Board issued its order on November 17, 1961, and the plaintiff knew elections were scheduled to commence within 30 days thereof, this long delay in bringing the motion is unfortunate, particularly since the time was found to prepare printed motion papers.

[2] Only the Regional Director of the Second Region of the National Labor Relations Board is named as a defendant. It is clear that his responsibilities entail only the mechanics of executing the Board's direction of election. Whether fully effective relief requires the Court's order to reach the Board itself, and whether the members of the Board are indispensable parties to the action, are questions unnecessary to determine, in view of what follows.

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[3] This Union did not permit its name to be placed on the ballot. Another Honduran union, Sindicato Maritimo Nacional de Honduras, "Sindimar", the National Maritime Union of America, AFL-CIO, and "no union", are the three choices offered by the proposed ballot.

[4] *Rey v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *cf. Ma. ie Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365 (1960); *Afran Transport Company v. National Maritime Union*, 169 F. Supp. 416 (1958); *Bobolakis v. Compania Panamena Maritima San Cristobal*, 168 F. Supp. 236, 238 (1958).

[5] Article VI of the Constitution provides, in pertinent part, as follows:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

Assuming there is a conflict between the Board's action, properly exercised pursuant to the labor Management Relations Act of

1947, that is to say, any action not contrary to any express statutory command of the Act and the Treaty of Friendship, Commerce, etc. between the United States and Honduras, dated December 7, 1927, 45 Stat. 2618 (1927), an interesting legal question is posed. It does not follow, however, that Congress' Constitutional powers are diminished by the prior treaty commitments of the United States. Since neither has intrinsic superiority over the other, the later Congressional enactment should prevail. *Leges posteriores priores contrarias abrogant* see *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 598-599 (1884); *Taylor* v. *Morton*, 3 Fed. Cas. No. 13,799 (1855); *cf. Cook* v. *United States*, 288 U.S. 102 (1933).

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[6] 49 Stat. 454 (1935) as amended, 29 U.S.C. § 160 (e), (f) (1952) provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals wherein the unfair labor practice in question was alleged to have been engaged in." This is the only provision for judicial review in the Act. The procedure for review of certification proceedings is set forth in § 9 (d) providing that whenever an order of the Board is made pursuant to an unfair labor practices hearing and there is a petition for enforcement or review of the order by the court of appeals, the Board's certification is to be included in the transcript, and the validity of the whole representation determination is then open to judicial examination.

[7] See the Legislative History of the Labor Management Relations Act, 1947, (G.P.O. 1948); *Leedom* v. *Kyne*, 358 U.S. 185, 191-194 (1958); *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 405-411 (1940); *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716-717 (2d Cir. 1948).

[8] *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127 (2d Cir. 1960); *McLeod* v. *Local 176*, 288 F. 2d 198 (2d Cir. 1961); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (D.C. Cir. 1960); *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (D.C. Cir. 1959), *Cert. denied*, 359 U.S. 1011 (1959).

[9] This language is that of Judge Learned Hand, writing for the unanimous Court in *Fay* v. *Douds*, 172 F. 2d 720, 723 (2d Cir. 1949):

> "If this assertion of constitutional right is not transparently frivolous, it gave the District Court jurisdiction; and, having once acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable."

(File endorsement omitted)

63. IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S.A., *Plaintiff*,

against

IVAN C. McLEOD, as Regional Director of the Second Region of the NATIONAL LABOR RELATIONS BOARD, *Defendant*.

Notice of Appeal—December 18, 1961

SIRS:

PLEASE TAKE NOTICE that plaintiff hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order made by the Honorable Edmund L. Palmieri, United States District Judge, dated December 16, 1961 and filed with the Clerk of the United States District Court for the Southern District of New York on that date.

Yours, etc.

Dated, December 18, 1961.

WHITE & CASE
By ORISON S. MARDEN
a member of the firm
Attorneys for Plaintiff
14 Wall Street
New York 5, N. Y.

To:
STUART ROTHMAN, Esq.,
General Counsel,
National Labor Relations Board,
Washington, D. C.

SAMUEL M. KAYNARD, Esq.,
Regional Attorney, Second Region,
National Labor Relations Board,
745 Fifth Avenue
New York 22, N. Y.

Attorneys for Defendant

(File endorsement omitted)

64 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EMPRESA HONDURENA DE VAPORES, S.A., *Plaintiff*.

v.

IVAN C. MCLEOD, as Regional Director of the Second Region of the National Labor Relations Board, *Defendant*.

Order Denying Motion for a Stay Without Prejudice to Renewal—December 16, 1961

A motion having been made herein by counsel for plaintiff-appellant for a stay of a representation election by the National Labor Relations Board pending appeal from the decision of Judge Palmieri, dated December 16, 1961, denying plaintiff-appellant's motion for an injunction against the holding of said election,

UPON CONSIDERATION THEREOF, it is ordered that said motion be denied without prejudice to renew the said motion at any time in the future.

Dated that 16th day of December, 1961

THURGOOD MARSHALL
United States Circuit Judge

65 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S.A.,
Plaintiff-Appellant,
against
IVAN C. McLEOD, Regional Director for the Second Region of the NATIONAL LABOR RELATIONS BOARD,
Deefndant-Appellee.

Order to Show Cause—December 18, 1961.

Upon the annexed affidavit of ORISON S. MARDEN, sworn to December 18, 1961, it is

ORDERED that said defendant show cause before this Court in Room 1705 at the Federal Court House, Foley Square, New York City, on December 20, 1961, at 3:00 P.M. why an Order should not be made herein enjoining said defendant and all persons acting for or in concert or participation with him who receive actual notice of this Order by personal service or otherwise, from conducting a representation electing among plaintiff's unlicensed seamen until the hearing and determination of the appeal taken by plaintiff from an order made by the Honorable Edmund L. Palmieri dated December 16, 1961 denying plaintiff's motion for a preliminary injunction; and it is further

ORDERED that the hearing of the appeal taken by plaintiff be expedited and that the same be set for argument before this Court on the 20th day of December, 1961, at 3:00 P.M.

Service of a copy of this Order and the annexed affidavit of Orison S. Marden, sworn to December 18, 1961,
66 on Samuel M. Kaynard, Esq., one of the attorneys for the defendant in this action on or before December 18, 1961 at 4:00 P.M, shall be deemed sufficient.

Dated, December 18,1961

J. EDWARD LUMBARD
Chief Judge

67 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff-Appellant,

against

IVAN C. McLEOD, Regional Director for the Second Region of the NATIONAL LABOR RELATIONS BOARD,
Defendant-Appellee.

Affidavit—December 18, 1961

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

ORISON S. MARDEN, being duly sworn, says:

I am one of the attorneys for plaintiff in this action.

This affidavit is submitted in support of the attached Order to Show Cause for a temporary restraining order enjoining defendant from conducting an election among plaintiff's unlicensed seamen employees until the hearing and determination of an appeal taken by plaintiff from an order made and filed by Honorable Edmund L. Palmieri, United States District Judge, dated December 16, 1961, denying plaintiff's motion for a preliminary injunction during the pendency of this action. On December 16, 1961, the Honorable Thurgood Marshall, Circuit Judge, denied a motion made by plaintiff for the relief requested herein but without prejudice to the renewal thereof.

While the original Decision and Direction of Election dated November 16, 1961 called for an election not
68 later than thirty (30) days after the date of said Order, said Order was amended on December 5, 1961 so as to provide "It is hereby Ordered that the Direction of Election be, and it hereby is, amended to provide for the conduct of the election at the discretion of the Regional Director."

According to a Notice of Election issued on December 12, 1961 and a Supplemental Notice dated December 12, 1961, balloting in connection with the election directed by the National Labor Relations Board to be conducted by defend-

ant is scheduled to take place on each of the vessels owned and/or operated by plaintiff upon their arrival in United States ports between December 17, 1961 and January 31, 1962, and balloting on board vessels not scheduled to arrive in United States ports between December 17, 1961, and January 31, 1962, will be by mail. The ballots are to be mailed by defendant on January 15, 1962 and are required to be returned by the close of business on February 15, 1962.

There will be submitted to the Court on this application, copies of the verified complaint in this action, the Order to Show Cause on plaintiff's application for an injunction pending trial, dated December 12, 1961, and the affidavit of Orison S. Marden sworn to December 12, 1961 submitted in support thereof.

By reason of the facts stated in the verified complaint and the law set forth in the brief submitted by plaintiff to Judge Palmieri, this Court respectfully requested to sign the attached Order.

69 The said order provides for expediting the hearing of the appeal taken by plaintiff and temporarily restrains defendant pending the hearing and determination of the appeal. Plaintiff is prepared to proceed forthwith with the argument of its appeal. No previous application has been made for the relief requested herein except as stated hereinabove.

ORISON S. MARDEN

Sworn to before me this 18th day of December, 1961

ROBERT A. PERKINS
Notary Public,
State of New York

70 (File endorsement omitted)

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71 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff-Appellant,

v.

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Defendant-Appellee.

Before LUMBARD, Chief Judge, FRIENDLY and MARSHALL, Circuit Judges.

Order for Stay—December 20, 1961

This appeal raises serious questions as to the power of the National Labor Relations Board to order an election, originally directed for December 17, 1961, but stayed by order of the District Court for the District of Columbia, on Honduran registered vessels, and as to the jurisdiction of the District Court to review it. The proceedings before the Board culminating in its order of November 15, 1961, lasted many months. The Government of Honduras through its ambassador has expressed concern over the Board's decision. Although normally we would not be disposed to find irreparable damage in the mere holding of an election, the international aspects of this case lead us to take a different view, especially in view of the lack of any showing that a postponement necessary to proper consideration of the case will be prejudicial. Accordingly we stay
72 the election pending our determination of this appeal.

Needless to say, this action on our part intimates no view how we will ultimately decide any of the serious issues here presented.

J. EDWARD LUMBARD
HENRY J. FRIENDLY
THURGOOD MARSHALL
U.S.C.JJ.

20 December 1961.

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73 (Filed endorsement omitted)

74 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 233—September Term, 1961.

Argued December 20, 1961

Docket No. 27314

EMPRESA HONDURENA DE VAPORES, S.A.,
Plaintiff-Appellant,

v.

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Defendant-Appellee,

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Intervenor-Appellee.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and MARSHALL, *Circuit Judges.*

Plaintiff appeals from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, denying a motion to enjoin defendant, Regional Director of the National Labor Relations Board, *pendente lite* from conducting a representation election on plaintiff's Honduran registered vessels. Reversed.

75. ORISON S. MARDEN (White & Case), New York, New York (Chester Bordeau and William D. Conwell, of Counsel), *for Plaintiff-Appellant.*

ALLAN I. MENDELSOHN (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D. C., and Samuel M. Kaynard, Regional Attorney, New York, New York), *for Defendant-Appellee.*

HERMAN E. COOPER, New York, New York, *for Intervenor-Appellee.*

ALFRED A. GIARDINO, New York, New York, *for United Fruit Company.*

Opinion—January 12, 1962

FRIENDLY, *Circuit Judge:*

The complaint of Empresa Hondurena de Vapores, S.A., hereafter Empresa, against the Regional Director of the National Labor Relations Board, filed in the District Court for the Southern District of New York on December 12, 1961, made allegations which we summarize as follows:

(1) Empresa is a Honduran corporation, organized in 1941, with its principal office and place of business in Puerto Cortes, Honduras. It operates thirteen seagoing vessels, ten of which it owns and three of which are owned by Balboa Shipping Company, Inc., a Panamanian corporation, which, like plaintiff, is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. All the
76 vessels are registered under the laws of Honduras and fly the Honduran flag.

(2) The vessels are manned by unlicensed seamen, some 335 in number, all but one of whom are citizens of Honduras (the one being a British subject), employed in Honduras under Shipping Articles executed there. The vessels, all of which are time-chartered to United Fruit, ply between ports in Central and South America, the United States, Canada and Europe; all of them call regularly at Honduran ports for trade and renewal of Ship's Articles. Since 1941 the seamen have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, hereafter Marineros, as their collective bargaining agent. A collective bargaining agreement between Empresa and Marineros was made in 1957, to remain effective until April 15, 1959, and thereafter to be automatically renewed for successive two year terms in the absence of contrary notice; it now stands renewed until February 15, 1963. Honduras "has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon"; under that law plaintiff is required to recognize Marineros as the exclusive bargaining agent of its unlicensed seamen, and labor grievances are handled by representatives of plaintiff and Marineros subject to the Ministry of Labor and the Labor Courts of Honduras.

(3) On November 15, 1961, the NLRB rendered a Decision and Direction of Election, 134 NLRB No. 25, which, as later modified, instructed the defendant Regional Director to conduct an election among plaintiff's seamen to determine whether they desired to be represented for collective bargaining purposes by National Maritime Union, AFL-CIO, by Sindicato Maritimo Nacional de Hon-
77 duras ("Sindimar"), or by neither.[1] The Honduran Labor Code prohibits the exercise of functions by a union "so long as it does not have recognition of its juridic personality" or if its personnel is not at least 90% Honduran; National Maritime Union fails on both counts. Defendant has informed plaintiff that the election is to take place, beginning December 17, 1961, on board vessels arriving in United States ports between December 17, 1961 and January 31, 1962, and by mailing ballots to employees on vessels not so scheduled.

Alleging that the Board's direction violated Article 10 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618,[2] as well as the Constitution of the United States and principles of international law, plaintiff sought temporary and permanent injunctive relief. By order to show cause signed December 12, 1961, on an affidavit of counsel incorporating the allegations of the complaint, the motion for a temporary injunction was brought on for hearing before Judge Palmieri on December 14. The Regional Director moved to dismiss. He asserted that the District Court lacked jurisdiction over a direction for an election, that the request for relief was premature, that the members of the NLRB were indispensable parties defendant, and that in any event the Board's action was proper.

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[1] The Board's decision states that Marineros was notified the Board would grant it a right to intervene but did not reply.

[2] This states:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

78 Relevant to the last contention are certain additional facts stated in the Board's opinion and not challenged before us: United Fruit Company is predominantly United States owned. The bulk of its trade is between Central and South American countries which grow bananas and other tropical produce, and the United States. Empresa's officers are elected by its directors who are elected by United Fruit, and Empresa has always time-chartered all its vessels, almost entirely to United Fruit. However, Empresa "appears to function as a distinct corporate entity," and "There is nothing in the record to suggest that Empresa does not in fact carry out * * * typical responsibilities of the owner of a vessel under a time charter," including "hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel."[3] On the other hand, United Fruit determines the routing of Empresa's ships, communicating its desires and complaints to the captain or to some other officer of Empresa. The vessels regularly call at United States ports, carrying United Fruit cargo on inbound and outbound voyages and also general cargo on the latter; some of the ships also carry passengers. Empresa's vessels are used by United Fruit in the same manner as other chartered or owned vessels registered under United States law.

It should be observed also that the Attorney General, acting at the request of the Departments of State and Defense, was permitted to appear as *amicus curiae* before the Board in this and related cases. Although the Attorney General's brief to the Board stated that it was not its "purpose * * * to support or oppose the position of the
79 steamship companies or the position of the unions" (p. 2), it advanced (pp. 15-20) a list of proposed "principles to be applied in determining whether a vessel and its crew shall be deemed foreign and thus beyond the scope of the Act," and "submitted * * * that the flag, as a ready, recognizable, and accepted standard must be preferred pragmatically to any other and that in accordance with that standard, the indirect financial interest of Ameri-

[3] In view of these and other specific findings of fact we consider the Board's statement that United Fruit is a "joint employer" to be an erroneous legal conclusion, which must be disregarded.

can citizens in a foreign registered ship may not deprive a vessel of its status as a national of the country whose flag is flown."

Despite the time pressure created by plaintiff's failure to bring this action until almost the eve of the scheduled election, Judge Palmieri prepared a thoughtful opinion, filed on December 16. Holding that the District Court had jurisdiction of the subject matter since, as he believed, plaintiff had made a colorable allegation of denial of constitutional rights, see *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), he nevertheless denied the injunction since he was not convinced of the probability of plaintiff's success or by its claims of irreparable damage from the election. He therefore deemed it unnecessary to decide at that time whether the members of the Board were indispensable parties.

Although a motion for a stay pending appeal was initially denied, the appeal itself was argued on December 20. Meanwhile the election had been stayed as the result of a temporary restraining order issued by the District Court for the District of Columbia in an action by Marineros against the members of the Board. The argument having convinced us that the case presented serious issues involving the relations of the United States with a foreign government and that no irreparable damage would be caused by a brief delay of the election, we then issued a stay pending determination of the appeal. We have reached a conclusion different from that of the District Judge.

80 Two other circumstances must be mentioned before we proceed further: Under date of December 15, 1961, the Department of State, through its Legal Adviser, forwarded to Judge Palmieri, without comment, a note dated November 29, 1961, from the Ambassador of Honduras, protesting against the Board's decision, which was claimed to violate Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights,[4] to involve an

[4] Article 22 provides that "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have

intrusion by the United States into an area exclusively occupied by Honduras, and to infringe established principles of international law; the communication did not reach Judge Palmieri until December 18, after his decision had been filed. On January 10, 1962, the Department of Justice submitted to the District Court for the District of Columbia a letter saying that although the Department of State "does no support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

I. *The jurisdiction of the District Court.*

(1) Although the issue has not been raised, we must first consider whether the complaint, invoking 28 U. S. C. §§ 1331 and 1337, set forth a claim cognizable by a Federal district court, *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934).

As subsequent discussion will show, the complaint advanced a claim arising under a treaty sufficient to come within § 1331, whether or not the claim was meritori-
81 ous; the difficulty with respect to § 1331 is jurisdictional amount. When a plaintiff asserts the right to be free from regulation, "The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936). Here the complaint alleged that "the matter in controversy exceeds the value of $10,000, exclusive of interest and costs," but no facts were pleaded to substantiate this, and it is not obvious that an election alone would cause damage in that amount. Hence, if the allegation had been put in issue, as it was in the *McNutt* case and in *K V O S, Inc.* v. *Associated Press*, 299 U.S. 269 (1936), and plaintiff had not supported it, Federal jurisdiction under § 1331 could not be sustained. However, no such traverse was made and the allegation was not so clearly baseless that the court was bound to disregard it even in the absence of challenge, although the court "might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one

entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

over which it had jurisdiction," *K V O S, Inc.* v. *Associated Press, supra,* at 277.

Moreover, we think the complaint asserted a claim under § 1337, giving district courts jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce * * *," without regard to the amount in controversy. The National Labor Relations Act is such an Act, *American Federation of Labor* v. *Watson,* 327 U.S. 582 (1946); *Capital Service, Inc.* v. *NLRB,* 347 U.S. 501 (1954); the question is whether the action here is one "arising under" it. In support of a negative answer it could be said that what plaintiff is asserting is a right to be free from the Act, not a right allegedly conferred by it. But § 1337, like § 1331, speaks not of a claim created by, but of an action arising under, an act regulating commerce;

82 it would run counter both to the language and to the policy underlying the statute to hold that the jurisdictional grant did not include an action whose sole purpose is to challenge an order of a Federal agency sought to be justified by a Federal statute. Whatever might earlier have been thought because of language in *American Well Works Co.* v. *Lane & Bowler Co.,* 241 U.S. 257, 260 (1916), the later decision in *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180 (1921), seems to have crossed that bridge, see *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.,* 348 U.S. 437, 450 (1955); cases such as *Louisville & Nashville R.R.* v. *Mottley,* 211 U.S. 149 (1908), are distinguishable in that the action was to enforce a claim arising under state law, there a right under a contract, with the Federal statute a matter of defense, see also *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667, 672 (1950), whereas here, as in *Smith,* it is the proposed application of the Federal statute alone that gives rise to the action. We do not pretend the distinction to be altogether clear or satisfying; but if one line of cases or the other has to be favored, considerations of good sense support those permitting the sphere of application of Federal statutes to be determined by Federal Courts.[3]

[3] Professor Mishkin believes it now to be settled "that an action for a judgment declaring the non-existence of such a federally created right in the other party also falls within the federal ques-

83 (2) The next problem as to the jurisdiction of the District Court is presented by the first two grounds of defendant's motion to dismiss, best considered together, namely, that the court has no power to enjoin an order for an election, especially at the suit of the employer, and that plaintiff's resort to the courts is premature.

In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 286 F. 2d 127 (2 Cir. 1960), we stated that District

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tion statute." The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 179 (1953).

We have not overlooked that the action here is against a Federal officer—a circumstance which one feels ought make a difference but apparently, under existing statutes, doesn't. Simply as a matter of language it might be argued that if jurisdiction under 28 U.S.C. § 1331 fails for lack of the required amount, the action would come within 28 U.S.C. § 1346(a)(2) giving the district courts jurisdiction over "Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department * * *" But, apart from the inconsistency that one contention would assert the suit to be against the United States whereas the other would deny it, and the question whether § 1346(a)(2), the successor of the Tucker Act, 24 Stat. 505 (1887), authorizes an injunction, see *United States* v. *Jones*, 131 U.S. 1 (1889); cf. *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956), the argument would fail on the basis that "where the officers' powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). An authority on the subject says, with respect to such suits against federal officers, that "Apart from situations where a method of judicial review is particularly prescribed by statute, the only grant of jurisdiction that includes such cases is that in matters 'arising under' the Constitution or the laws. This mode of treatment includes limitations, such as jurisdictional amount and the rule that federal questions must appear without anticipation of defenses, that have no place in actions against federal officials, which are necessarily of federal concern." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemporary Problems 216, 220 (1948). *Deering, Milliken, Inc.* v. *Johnston*, —— F. 2d ——, —— (4 Cir. 1961), might suggest that § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e), could serve here as a special statutory provision such as Profesor Wechsler mentions, but that would require us to decide whether the NLRB's direction of election constituted "final agency action" within the meaning of that Act.

Court jurisdiction to enjoin Board directions in representation matters had been recognized in two types of cases, namely, (i) where plaintiff made an assertion, "not transparently frivolous," that failure to enjoin would deny rights guaranteed by the Constitution, *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), and (ii) where the Board had acted in plain contravention of a specific mandate of the Act, *Leedom* v. *Kyne*, 249 F. 2d 490 (D.C. Cir. 1957),
84 aff'd 358 U.S. 184 (1958). The instant case does not come within the second exception; although we conclude that the Board erred, its error was far from "plain," *International Assn. of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514, 516 (D.C. Cir. 1960). Neither, with all respect to the learned District Judge, do we think it came within the first. Assuming as we do that the claim that the Board's action violated Article 10 of the 1927 Treaty with Honduras, see fn. 2, was "not transparently frivolous," a claim that such action violated any constitutional rights of plaintiff would be. For, apart from the uncertainty how far a treaty confers rights upon nationals of the foreign state as distinguished from the state itself, see American Law Institute, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 5, §§ 109 and 110; cf. *Asakura* v. *Seattle*, 265 U.S. 332 (1924) and 28 U. S. C. § 1350, the Constitution does not prohibit Congress from legislating in violation of a treaty, *The Cherokee Tobacco*, 11 Wall. 616 (1870); *Head Money Cases*, 112 U.S. 580, 597-600 (1884), or directing its delegate to that end. On the other hand, the courts will not assume such a purpose on the part of Congress unless "clearly expressed," *Cook* v. *United States*, 288 U.S. 102, 119-120 (1933); *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888)—for one reason because such a violation would involve the United States in a claim for breach of its international obligation; Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 3, § 128. Any benefit plaintiff takes from the Treaty thus goes to statutory interpretation, not to constitutional right.

However, the failure of the complaint to come within either of the categories of actions to enjoin representation orders that have heretofore been sustained is not fatal;

the book has not been closed all time. *Leedom* v.
85 *Kyne*, *supra*, must be taken to have determined that, whatever may be the case with respect to orders of the National Mediation Board as to bargaining units, see *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *U N A Chapter; Flight Engineers International Assn.* v. *National Mediation Board*, 294 F. 2d 905 (D.C. Cir. 1961), cert. denied, —— U.S. —— (1962), representation orders of the NLRB have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938). Once that step has been taken, the courts must make up their minds, as best they can, whether in a particular type of case Congress would or would not have wished them to intervene against "agency action taken in excess of delegated powers," 358 U.S. at 190. The considerations as to delay from judicial intervention, persuasively marshalled in Mr. Justice Brennan's dissent for Mr. Justice Frankfurter and himself in *Leedom* v. *Kyne*, *supra*, at 191-196, argue for a negative answer in the usual case, having purely domestic significance, where the Board is alleged to have acted wrongly, although not plainly so; hence we gave such an answer in the *Local 1545* case and in *McLeod* v. *Local 476*, 288 F. 2d 198 (2 Cir. 1961), as the Court of Appeals for the District of Columbia has done in numerous cases cited in the *Local 1545* opinion.[6] An altogether different situation is presented when, as here, there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a
86 friendly foreign government; we cannot believe Congress would have wished to limit the role of the courts in that situation to cases where the Board had violated a "clear statutory command," *Leedom* v. *Norwich*,

[6] We take it that the point of the "plain contravention" requirement is to close the doors of the courts at the very outset to actions for injunctions in representation matters, which, though ultimately found unmeritorious, would have accomplished much of their objective by the very time required for judicial consideration. An inevitable corollary of the requirement is that a court must sometimes refuse to entertain a complaint asserting what it regards as a valid claim.

Connecticut Printing Specialties and Paper Products Union, 275 F. 2d 628 (D.C. Cir.), cert. denied, 362 U.S. 969 (1960), as against a command not so clear. Not only is the case in favor of judicial action stronger than in the typical domestic representation dispute, but the practical objections against it are weaker. Here the Board is entering a new and sensitive area of activity; while we do not assert that its jurisdiction with respect to foreign flag ships is to be decided on an all or nothing basis, the significant variations among the fact patterns are sufficiently few that guidelines ought soon be pricked out by the courts[7]—failing the more desirable solution of new legislation—and the problem will thus not be a constantly recurring one.

Assuming that the principle of *Leedom* v. *Kyne* may be thus extended in a proper case, two further problems must be faced. One is that here the suit is by the employer who, arguably, is sufficiently protected by the possibility of sitting out the election and certification, continuing to recognize the existing union, awaiting the filing of an unfair labor practice charge for so doing, and, when held for this, bringing the direction of election before a court of appeals, as provided in § 9(d) of the Act, on enforcement or review proceedings under § 10(f). The second is that, unlike *Leedom* v. *Kyne*, the instant action was brought to enjoin an election rather than a certification. See Cox, The Major Labor Decisions of the Supreme Court, October Term 1958, reprinted in Gellhorn and Byse, Administrative Law: Cases and Comments (1960 ed.), 441, 447-448.

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An answer to the first point may be that, as shown in 73 Harv. L. Rev. 84, 219-220 (1959), the possibility of the plaintiff's precipitating an unfair practice charge was present in *Leedom* v. *Kyne* itself; yet the Court evidently did not deem this fatal. An answer to the second, in the circumstances here, is that, with Marineros not on the ballot, the situation was not one, such as in *Local 1545*, where a victory by a particular union at the polls might eliminate any need for resorting to the courts; here, whether the winner was N M U, Sindimar, or "no-union," plaintiff

[7] The Supreme Court has already granted certiorari. —— U.S. —— (1961), in a case involving one rather typical pattern, *Incres Steamship Co., Ltd. International Maritime Workers Union*, 40 N.Y. 2d 218, 219 N.Y.S. 2d 21 (1961).

would suffer by being obliged to breach its contract with Marinéros and, on the allegations of its complaint, to violate Honduran law by doing so. Sufficient though these answers may be, a more generally satisfying one is again the distinction between a case with international aspects and one without. If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the best time to stop it is before the offense occurs, not somewhere along the line.

(3) The final problem as to the power of the District Court to entertain the action arises from the contention of the Regional Director[8] that the action must be dismissed since the members of the Labor Board were indispensable parties-defendant but were not named as such and could not have been served with process in the Southern District of New York and would have had a valid venue objection, 28 U.S.C. § 1391(b), if they had been.

So far as we have been able to determine, this precise question has not been squarely decided by any court
88 of appeals. It has provoked differences of opinion in the district courts. In *American Communications Ass'n* v. *Schauffler*, 80 F. Supp. 400 (E.D. Pa. 1948), a three-judge court with one judge dissenting, and in *White* v. *Douds*, 80 F. Supp. 402 (S.D.N.Y. 1948), Chief Judge Ryan, held that the Board members were essential parties-defendant. In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 187 F. Supp. 921 (S.D.N.Y. 1960), Judge Dimock took a contrary view, citing *Williams* v. *Fanning*, 332 U.S. 490 (1947); in affirming his dismissal of the complaint on other grounds, we expressly did not pass upon that issue, 286 F. 2d at 129. *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d —— (4 Cir. 1961), lends support to Judge Dimock's position, although it involved the conduct of a hearing rather than of an election directed by the Board.

Williams v. *Fanning*, *supra*, upheld a suit to enjoin a postmaster from carrying out a fraud order of the Postmaster General. The rule there stated, 332 U.S. at 493-494,

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[8] The Board's order of November 15 provided: "The Regional Director • • • shall direct and supervise the election"; the supplemental order of December 5 provided "for the conduct of the election at the discretion of the Regional Director."

is that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" but not "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court"; it is immaterial, in the latter event, that the subordinate "would be left under a command of his superior to do what the court has forbidden." This would seem to carry the day for plaintiff save for defendant's contention that the Board is not required to have an election conducted by the regional director, citing § 102.69 of its Rules and Regulations—the implication being, we suppose, that a decree against the regional director would not "effectively" grant relief since the Board could circumvent the decree by ordering someone else to conduct the election. We need not consider whether a response
89 that the Board could not do any such thing, since the decree would be *res adjudicata*, would be circular reasoning or not, see 3 Davis, Administrative Law Treatise (1958), pp. 602-603. For the Supreme Court, when confronted with an essentially similar contention with respect to the need for joining the Commissioner of Immigration and the Attorney General with the District Director in the review of a deportation order, deemed it enough to say, "But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities." *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 53 (1955). Significant also, and quite applicable here, is the Court's statement in that case, "Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner."[9] We hold the members were not necessary parties.

[9] See Notes, Williams v. Fanning Revisited: The Indispensable Superior in Judicial Review of Administrative Actions, 54 Colum. L. Rev. 1128 (1954); The Doctrine of Indispensable Parties as Applied in Review of Administrative Action, 103 U. of Pa. L. Rev. 238 (1954).

II. *The power of the Board to direct an election.*

Although the appeal is from denial of a temporary injunction, there appears to be no real dispute on factual matters. The case came before the District Judge on plaintiff's application for an injunction and the Board's motion to dismiss the complaint; hence we shall assume for the purposes of this opinion that the facts are as stated above, although the parties will be free to challenge them at a trial on final relief. The issue being one of law, the standard is whether we think the District Judge was wrong, not whether he was "clearly" so, *Carroll* v. *Associated Musicians*, 295 F. 2d 484, 488-489 (2 Cir. 1961), and cases cited.

90 The defendant's position proceeds from the basis that § 9(c) of the Act authorizes direction of an election if the Board has determined that "a question of representation affecting commerce exists"; that "affecting commerce" is defined by § 2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce"; and that § 2(6) defines commerce to include "trade, traffic, commerce, transportation or communication • • • between any foreign country and any State, Territory, or the District of Columbia." Literally the words cover the case. Yet the Board would hardly insist that the words apply to everything within their literal reach; we have not heard it suggested that the Board considers its power to extend to the stevedores who load Empresa's ships in Honduras although they are engaged in "commerce" quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States and American employees of the parent were objecting to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage, *Lauritzen* v. *Larsen*, 345 U.S. 571, 577-579, 581-582 (1953); as was said

in regard to another type of labor regulation, "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose," *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 286 (1949).

91 The problem of workers directly engaged in transportation is more difficult; the stevedores stay on the piers, the miners remain in the mines, but the seamen come to the United States and return. The Board is right in saying the scope of its power in respect of the latter is not to be determined by the simple notion that a Honduran registered ship is a floating piece of Honduran territory; that is a mere "figure of speech" whose fictitious character was exposed long ago, *Wildenhus' Case*, 120 U.S. 1 (1887); *Cunard SS. Co.* v. *Mellon*, 262 U.S. 100, 123-124 (1923).

Although Article 10 of the Treaty, which requires the United States to recognize Empresa's vessels as vessels of Honduras, also is not the end of our investigation, it surely must be the beginning. As was said with respect to the Jones Act in *Lauritzen* v. *Larsen*, 345 U.S. at 584-585, "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag" and, more generally, "the weight given to the ensign overbears most other connecting events in determining applicable law." How "cardinal" the importance is and how much "weight" should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied, taking particular account of the danger that an attempt to apply our law may result in a collision with the foreign sovereign. In the *Lauritzen* case the single United States factor, that Larsen had joined the crew and signed the articles in New York, was adjudged insufficient to tilt the scale against the law of the flag. So also, in *Romero* v. *International Terminal Co.*, 358 U.S. 354, 383-384 (1959), the factor that the injury occurred in New Jersey. On the other hand, in *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2 Cir.), cert. denied, 287 U.S. 642 (1932), this court applied the Jones Act to

92 the American demise-charterer of a Honduran registered vessel, as to an accident on the high seas to an

American seaman hired in New York. See also the cases summarized in footnote 3 of the *Lauritzen* opinion, 345 U.S. at 573, and *Bartholomew* v. *Universe Tankships*, 263 F. 2d 437 (2 Cir.), cert. denied, 359 U.S. 1000 (1959).

Decisions in regard to the application of United States statutes dealing with seamen's wages are perhaps more directly relevant to our problem. A provision of the Seamen's Act of 1915, making it unlawful to pay wages in advance, 38 Stat. 1164, 1169, 46 U.S.C. § 599(e), was held inapplicable "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment," even though the statute specifically extended to "foreign vessels while in waters of the United States," *Sandberg* v. *McDonald*, 248 U.S. 185, 194, 195 (1918), see also *Jackson* v. *SS. Archimedes*, 275 U.S. 463 (1928). On the other hand, the 1920 amendment of § 4 of the Seamen's Act, 41 Stat. 1006, 46 U.S.C. § 597, granting seamen on United States vessels the right to demand half of their earned wages at every port and making the section applicable to "seamen on foreign vessels while in harbors of the United States," was construed to cover the suit of a British seaman on a British vessel under British articles in the light of a further provision that "the courts of the United States shall be open to such seamen for its enforcement," *Strathearn SS. Co.* v. *Dillon*, 252 U.S. 348 (1902).[10]

93 It is with this background that we come to *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957). It involved the SS. Riviera, owned by a Panamanian corporation, sailing under the Liberian flag, and manned by a foreign crew, principally German and British, who had signed a British form of articles at Bremen, Germany. While the Riviera was in Portland, Oregon, loading

[10] The Court thought "the provisions of the act as the same are written" made plain "the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned • • •" 252 U.S. at 355. An abundance of legislative material leading to the same conclusion is summarized in the opinion that Mr. Justice Brandeis had prepared for possible delivery, see Bickel, The Unpublished Opinions of Mr. Justice Brandeis, pp. 35, 47 ff., reprinted in 69 Harv. L. Rev. 1177, 1190 ff. (1956), and *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, 573-574 (2 Cir.), cert. denied, 364 U.S. 915 (1960).

a cargo of wheat destined for India, crew members struck because of a wage dispute, and picketed the vessel. The picketing was later continued by three American unions. The ship-owner's action, in which federal jurisdiction was predicated on diverse citizenship, sought damages from these unions and their representatives, under Oregon law. The defense was that the Labor-Management Relations Act had preempted the field; the Supreme Court held the defense unfounded. The opinion, by Mr. Justice Clark, stated, 353 U.S. at 143:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees."

Mr. Justice Douglas dissented on the ground that "The case involves a contest between American unions and a foreign ship"; that since the foreign ship was in competition with American vessels paying higher wages, "American unions * * * have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel"; that the picketing, on American soil, either was or was not a violation of § 303(a)(1) or (2) of the Taft-Hartley Act; that "even if we assume *arguendo* that the foreign vessel would not be subject to the regulatory provisions of the Act, it could nonetheless sue under § 303(b) to get
94 protection from any unfair labor practice condemned by the Act"; hence Congress has occupied the field, 353 U.S. at 147-150. The only subsequent Supreme Court decision in this area is *Marine Cooks* v. *Panama SS. Co.*, 362 U.S. 365 (1960). The holding, that the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, deprived a district court of jurisdiction to enjoin an American union from picketing, on American soil, a Liberian ship owned by one Liberian corporation and time-chartered to another and manned by a foreign crew, is without direct application to the problem here. No conflict with foreign governments or foreign laws is caused if Congress chooses to stay a Federal court from enjoining the picketing in the United States of a foreign flag ship involved in a labor dispute, as it did in the case of

ships under our own flag until 1947 and still does so far as private suits are concerned, see *A. H. Bull S.S. Co.* v. *Seafarers' Int'l Union*, 250 F. 2d 326 (2 Cir. 1957). Hence the Court's conclusion that Congress intended the Norris-LaGuardia Act to apply in such a case does not support an inference that Congress intended the same with respect to the National Labor Relations Act—just as it does not show the contrary. However, in disapproving the Court of Appeals' reliance on *Benz* in reaching a contrary result, the Supreme Court said, at p. 369:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon Law."

95 The Board seeks to distinguish *Benz* on the ground that it involved no such indirect American ownership and no such regular coming and going from American ports as here. The "labor disputes between nationals of other countries operating ships under foreign laws," there said not to be covered by the Act, would thus not include a dispute where the employer was a wholly-owned subsidiary of an American corporation, also operating ships under our own flag, even when as here the subsidiary had been formed long before controversy arose and none of the ordinary bases for piercing the corporate veil exist, see *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied, —— U.S. —— (1961). Stress is laid upon the sentence in the *Benz* opinion, "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing," 353 U.S. at 142, and upon the reference to "temporarily" in *Marine Cooks*. As against these respects in which the instant case is stronger than *Benz* for the application of the Labor Act, there is at least one in which it may be weaker. As Mr. Justice Douglas

pointed out in his dissent, the *Benz* case did not directly involve the application of the panoply of labor regulation embodied in §§ 7, 8, 9 and 10, but only the provisions of § 303 of the Taft-Hartley Act relating to picketing, there wholly on American soil; it is hard to believe that foreign governments would [illegible], or under international practice would have any right to be, concerned with whether the rights of their ships to damages for such picketing were governed by Federal or state law.[11] Here, on the other
96 hand, application of §§ 7, 8, 9 and 10 of the National Labor Relations Act would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which, though of more interest to the United States than those in *Benz*, are still Honduras' "primary concern," 336 U.S. at 286.

The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity -admittedly not fictitious- of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages: these are substantially outweighed for the purpose here at issue, by Honduras' interests.

Although the application of the Jones Act to accidents on foreign registered vessels involves the probability of rules of liability and amounts of recovery different from the law of the flag, as the discussions in *Lauritzen*, 345 U.S. at 575-576 and in *Romero*, 358 U.S. at 358, show,

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[11] However, the Court may have thought that the liabilities imposed on unions by § 303 and the rights conferred by §§ 7, 8, 9 and 10 must be regarded as a single package; see Note, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L. J. 498, 518-519 (1960).

imposition of United States law on the rights of a seaman to recover against a ship owner or operator for personal injury is not likely to involve either party in a breach of contract with a third person or in the violation of a foreign governmental requirement. The occasional application of the antitrust laws to activities abroad has not been without its problems, see *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All E. R. 780, 782, 784; *United States* v. *Holophane Co.*, 352 U.S. 903 (1956), even though the activity is usually of relatively small significance to the total economy of the foreign land. Here, on the allegations of the complaint, the conflict between United States and Honduran law would be constant;[12] far from dealing only with incidents while the ships were in American waters, the Board would be regularly applying the shifting standards of its own decisions, and those of American courts and American legislators, to conduct in Honduras, where the bargaining between Empresa and its employees has always taken place;[13] it would be endeavoring to enforce its will on matters that Honduras, with a better claim, regards as for itself to decide. Compare *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 646-647 (2 Cir.), cert. denied, 352 U.S. 871 (1956). The situation here differs sharply from the United States' informing itself as to contracts relating to the movement of traffic between the United States and a foreign country, *Kerr SS. Co.* v. *United States*, 284 F. 2d 61 (2 Cir. 1960); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147, 153 (D. C. Cir. 1961), or even taking action with respect thereto, *Thomsen* v. *Cayser*, 243 U.S. 66 (1917). The case is appropriate for application of Mr. Justice Jackson's warning that "in dealing with international commerce we cannot be unmind-

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[12] See the discussion in 69 Yale L. J. 498, 514-515 (1960).

[13] A wryly amusing illustration is furnished by the Board's explanation, in its opinion in this very case, fn. 23, that the existing collective bargaining agreement between Empresa and Marineros "is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: St. Louis Independent Packing Company, 122 NLRB 887, 889." One wonders how fully the Labor Court of Honduras is informed about the NLRB's "contract-bar" rule.

ful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our
98 laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." 345 U.S. at 582. We realize that if the Labor Act is inapplicable, owners of foreign flag ships such as Empresa will be deprived of the protection against certain unfair labor practices by the Federal courts accorded employers subject to the Act my such provisions as § 10(1) and § 303; but the practical consequences of this are less serious than those of a contrary holding. At least so the owners think, with the apparent concurrence of the Supreme Court in *Benz*.

Our belief that the Labor Act should not be held applicable in a case such as this is reinforced by the Geneva Convention on the High Seas, ratified by the United States on March 24, 1961, but not yet effective for lack of required ratification by 22 nations. Article 5, § 1, of the Convention reads:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Discussion seems to have been centered on what happens if the "genuine link" does not exist;[14] neither the
99 text nor such explanatory materials as we have found say specifically what happens if the conditions of the

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[14] The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands and by the International Labor Conference, "which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered that there was no 'genuine link' between the state and the ship." Report of the Committee on Foreign Relations to

final sentence are met. Yet, since it was deemed so important to insist upon the existence of a "genuine link" and the flag state's effective exercise of "jurisdiction and control in administrative, technical and social matters over ships flying its flag," it would be unreasonable to conclude that when all this had been done other states do not owe some obligation of respect.[15]

Three other matters ought be mentioned before we conclude:

(1) We have not discussed the conflicting contentions as to the effect of Article 22 of the Treaty with Honduras, quoted in footnote 4—plaintiff arguing that application of the Labor Act would violate the first clause, particularly in the light of the Supreme Court's statement in *Marine Cooks* quoted above, and defendant contending that the matter is one of "the execution of contracts" as to which the final sentence permits the application of "local laws." The problem is not an easy one; the view we take of the instant case makes it unnecessary for us to decide it.

(2) We realize that American unions understandably desire to organize vessels which they conceive to be in substance a part of this country's merchant marine, and that attempts to implement that desire can lead to a breach of the industrial peace which the Board is bound to promote, particularly when, as here, the stockholder of the foreign flag ships operates American flag vessels as well. Last summer's strike of the American merchant marine, with which we have some familiarity, see *United States* v.

the Senate, 106 Cong. Rec. 10382 (1960). The Senate was told that the effect of the language as adopted in Geneva is that "no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state," but "Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such event, it would be for the Court to decide whether or not a genuine link existed." *Id.*

[15] Although the Geneva Convention has not yet become effective, a convention representing such a consensus of thought by the leading maritime nations should be given weight by a United States court as evidence of international practice, especially after ratification by this country.

National Marine Engineers' Beneficial Assn., 294 F. 2d 385 (2 Cir. 1961), sufficiently demonstrates this. Therefore, we recognize that a controversy between an American union and Empresa could lead or tend to lead "to a labor dispute burdening or obstructing commerce or the free flow of commerce" carried on by American flag ships, as well as directly obstructing commerce carried on by foreign ones. However, that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent this. Even if we were to make the unrealistic assumption that Congress was so far-seeing as not only to have contemplated the growth of flags of convenience when it adopted the Labor Act in 1935,[16] but also to have anticipated cases where an American company would operate some ships under our own flag and
101 others through foreign subsidiaries flying the flags of other countries, we see no basis for believing Congress would have chosen to solve the problem by an exercise of jurisdiction which would create such a conflict with a foreign government as would seem inevitable here. Mr. Justice Clark's statement in *Benz*, 353 U.S. at 147, seems exceedingly apposite:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the faculities necessary to make fairly such

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[16] The use of "flags of convenience" by United States' enterprises is said to have begun in an effort to make what had been American ships available for the transportation of needed cargoes to powers resisting Nazi aggression despite the Neutrality Act of 1939, 54 Stat. 4, 6 Benedict, Admiralty (1958), 219-220; Note, Pan-Lib-Hon Registration of American-Owned Merchant Ships: Governmental Policy and the Problems of the Courts, 60 Colum. L. Rev. 711, fn. 1 (1960). It has continued for economic reasons. See Note, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L. J. 498 (1960). The letter of the Secretary of Defense attached to the Attorney General's brief to the NLRB indicated that, as of 27 September 1960, the deadweight tanker tonnage available to the United States under "Panlibhon" (Panama, Liberia, Honduras) registry was some 120%, and the general cargo tonnage some 46%, of the United States flag tonnage.

an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."[17]

(3) In order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say.[18]

The order denying a temporary injunction is reversed.

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[17] The Secretary of Labor has announced the creation of a three-man review board to study the flag of convenience controversy. N. Y. Times, Sept. 20, 1961, p. 47, col. 6.

[18] The Board decisions include *West India Fruit and Steamship Co., Inc.*, 130 NLRB No. 46, an unfair labor practice case now pending, on petition to review, in the Fifth Circuit; *Peninsular & Occidental SS. Co.*, 132 NLRB No. 1, also an unfair labor practice case; *Eastern Shipping Corp.*, 132 NLRB No. 72, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, both representation cases. *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625 (1960), cert. denied, 366 U.S. 905 (1961), and *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N.Y. 2d 218, 219 N.Y.S. 2d 21, cert. granted, —— U.S. —— (1961), involved the applicability of state laws with respect to picketing, as against claims of federal preemption.

102 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, *Chief Judge*, Hon. Henry J. Friendly, Hon. Thurgood Marshall, *Circuit Judges*.

Empresa Hondureña de Vapores, S. A., *Plaintiff-Appellant*,

v.

Ivan C. McLeod, Regional Director for The Second Region of the National Labor Relations Board, *Defendant-Appellee*,

National Maritime Union of America, AFL-CIO, *Intervenor-Appellee*.

Judgment—January 12, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. Daniel Fusaro
Clerk

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103 (File endorsement omitted)

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104 (Clerk's Certificate to foregoing transcript omitted in printing)

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105 UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, A. Daniel Fusaro, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from A-B, 1A to 84A,

inclusive, comprise the original record certified by the Clerk of the United States District Court for the Southern District of New York in the case of,

EMPRESA HONDURENA DE VAPORES, S. A., *Plaintiff-Appellant*,

against

IVAN C. MCLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Defendant-Appellee*,

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Intervenor-Appellee*.

filed in my office on December 19, 1961 and removed from the files of this Court in pursuance of an order of this Court dated January 29, 1962.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this first day of February in the year of our Lord one thousand nine hundred and sixty-two, and of the Independence of the said United States the one hundred and eighty-sixth.

A. DANIEL FUSARO
Clerk

[SEAL]

106 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DEPARTMENT OF JUSTICE

Washington

January 10, 1962

Honorable Alexander Holtzoff
United States District Judge
United States Courthouse
Washington 1, D. C.

Re: Sociedad National de Marineros
de Honduras v. McCulloch, et al.
Civil Action No. 4020-61

Dear Judge Holtzoff:

As a result of your inquiry I have sought to ascertain the views of the Department of State with respect to the Honduran Note of November 29, 1961 attached to the complaint in the above-entitled action. The Department of State informs me that, although the Department does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case.

We are sending copies of this letter to the counsel of record.

Sincerely yours,

WILLIAM H. ORRICK, JR.
William H. Orrick, Jr.
Assistant Attorney General

Let this be filed. Holtzoff, J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S. A., *Plaintiff*,

against

IVAN C. MCLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Defendant*.

Order—February 15, 1962

A motion having been made by plaintiff for an order providing that the mandate of the United States Court of Appeals for the Second Circuit, consisting of the opinion of the Honorable Henry J. Friendly, Circuit Judge, concurred in by the Honorable J. Edward Lumbard, Chief Judge and Thurgood Marshall, Circuit Judge, and the order of reversal of the United States Court of Appeals for the Second Circuit dated January 12, 1962, filed with the Clerk of this court on January 30, 1962, be made the order of this court and providing for the injunctive relief requested by plaintiff in the order to show cause dated December 12, 1961, and providing for the denial of the motion made by defendant for a dismissal of the action, and on motion of White & Case, attorneys for plaintiff, it is

1. Ordered, that the mandate of the United States Court of Appeals for the Second Circuit, filed with the Clerk of the United States District Court for the Southern District of New York on January 30, 1962, is hereby made the order of this court;

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109 2. Ordered, that pending the trial and adjudication of the issues raised by the complaint herein, the defendant, Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, and all persons acting for or in concert or in participation with him who receive actual notice of this order by personal service or otherwise, are hereby enjoined from conducting a representation election among plaintiff's unlicensed seamen until the final hearing and determination of this action, and it is further

3. Ordered, that security in the amount of $500 be furnished by plaintiff conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, and it is further

4. Ordered, that the motion of defendant to dis-
110 miss the complaint be, and the same hereby is, denied.

Dated: New York, New York
February 15th, 1962

Edmund L. Palmieri
United States District Judge

A True Copy

Herbert A. Charison, *Clerk*
By Elsie M. Eiler, *Deputy Clerk*

111 SUPREME COURT OF THE UNITED STATES

No. 858, October Term, 1961

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Petitioner*,

vs.

EMPRESA HONDURENA DE VAPORES, S. A.

Order Allowing Certiorari—June 11, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

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112 SUPREME COURT OF THE UNITED STATES

No. 862, October Term, 1961

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner*,

vs.

EMPRESA HONDURENA DE VAPORES, S. A.

Order Allowing Certiorari—June 11, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

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